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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~205~~ 150

JAMES W. FINLEY, APPELLANT,

vs.

THOMAS M. ISETT, WILLIAM C. BREWSTER, AND SAGE O. BUTLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED NOVEMBER 29, 1867.

SUPREME COURT OF THE UNITED STATES.

No. 299.

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vs.

THOMAS M. ISETT, WILLIAM C. BREWSTER, AND SAGE O. BUTLER.

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1 Proceedings before the Circuit Court of the United States, at a term thereof, begun and held at Des Moines, in the district of Iowa, on the second Tuesday of May, A. D. 1767.

Be it remembered that, on the 22d day of January, A. D. 1866, there was filed in the office of the clerk of the said Circuit Court, a bill in equity, in the words and figures following, to wit:

Circuit Court of the United States for the ninth circuit and district of Iowa.

UNITED STATES OF AMERICA, *ss*:

To the hon. the judges of the Circuit Court of the United States within and for the ninth circuit and district of Iowa, in chancery sitting:

James W. Finley, who is a citizen of the State of Illinois, brings in his bill of complaint against Thomas M. Isett and William C. Brewster and Sage O. Butler, who are citizens of the State of Iowa, and also reside in Muscatine, in the county of Muscatine, in the State of Iowa.

2 And thereupon your orator complains, and shows unto your honors that on the 4th day of March, A. D. 1865, the said Butler was seized in fee simple of, and otherwise well entitled to, the following described real estate, viz: One lot, number two (2), in section number two (2), in township number seventy-six (76) north, of range number two (2) west of the fifth principal meridian, containing two or more acres of land; also, the west ten feet of out-lot one, being a strip on the west side of said lot, ten feet wide, running the whole depth of said lot, to the centre of the slough; also, all buildings and machinery thereon, said property being known as "Butler's Pork-House," and situated in Muscatine, in the county of Muscatine, in the State of Iowa aforesaid.

And your orator further states that at the time above said, the said Sage O. Butler, one of the defendants above named, was justly indebted in, and owing to, your orator a large sum of money, namely, the sum of twenty-five thousand dollars and upwards, for money lent and advanced before that time, by your orator, to said Butler,

3 at his request, all of which indebtedness, together with interest thereon, is still justly due, owing, and wholly unpaid by said Butler to your orator.

And your orator further states that on or about the day aforesaid, namely, the fourth day of March last, the said Butler, in consideration of his being so indebted to your orator, and that your orator would forbear with him for the payment thereof, promised and agreed with your orator to give to your orator security upon account of, and for said debt, by way of mortgage upon the real estate and property aforesaid.

And your orator further states that afterward, to wit, on the sixteenth day of March aforesaid, the said Sage O. Butler, in pursuance of his said promise and agreement with your orator, and in intended

execution thereof, made and duly acknowledged a certain instrument and deed of mortgage of and upon said real estate and property, of which a copy is hereto attached, marked "Exhibit A," whereto your orator refers, and prays that the same may be deemed a part of this bill.

4 And your orator further states that said Butler, at the same time, and as part of the same transaction, made and signed his five certain promissory notes referred to in said mortgage for two thousad dollars each, payable, with interest thereon at the rate of six per cent., in one, two, three, four, and five years, respectively, after the date thereof, to said Isett & Brewster, or order.

And your orator further states that said Butler, at the time of making said notes and mortgage for ten thousand dollars, applied to said Isett & Brewster, who had been, and then were still, copartners in the business of bankers, at Muscatine aforesaid, and requested them to become and act as trustees in the matter of said notes and mortgage, and receive from said Butler, and hold said securities in trust; to deliver the same to your orator duly assigned, without recourse, when and as said Butler should direct them so to do. And your orator states, that said Isett & Brewster, upon being so applied to and requested by said Butler, consented and agreed, in consideration of the premises, to receive and hold said securities in trust

5 and for the purpose aforesaid. And they also agreed to assign said notes, without recourse, and to deliver the same to your orator, in accordance with said Butler's order to them for that purpose, as before stated.

And your orator further states that afterwards, to wit, on or about the twenty-fourth day of April last, the said Butler delivered the said mortgage and notes for ten thousand dollars to the said Isett & Brewster, upon faith of their said consent, promise, and agreement, in trust and confidence that said Isett & Brewster would receive and scrupulously and faithfully hold said securities in trust for your orator, and duly deliver the same to him when and as said Butler should as aforesaid order, and upon your orator's demand therefor.

And your orator further states that at the same time that the said Butler placed the said mortgage and notes in the hands of said Isett & Brewster, in trust as aforesaid; and as part of the same transaction, the said Butler wrote to your orator the following letter, viz:

MUSCATINE, *April* 24, '65

JAS. W. FINLEY, Esq., *Chicago.*:

6 DEAR SIR: I telegraphed you Saturday that I would meet you at Tremont House 10 o'clock. I was two minutes too late for the cars, Saturday, which prevented my being there, and I cannot leave home just now. I have now unsold, in your hands, and H. D. & Co., over $100,000 worth of pork products, and until I know how I am coming on it, cannot make propositions that would be satisfactory to you or to myself; but for the purpose of protecting you to some extent against hostile creditors, I executed my notes on the

16th March, at one, two, three, four, and five years, with interest at 6 pr. cent., to order of Messrs. Isett & Brewster, and secured the same by mortgage on my pork-house, and the mortgage was recorded, and Messrs. I. & B. [hold] these notes in trust, and will at proper time transfer them with mortgage (without recourse) to parties I may designate. When I know my exact situation, I hope to do more; but in meantime, please keep the above as confidential.

Truly, your friend,

S. O. BUTLER.

Which letter the said Butler read or handed to said Isett
7 & Brewster for them to read, before sending the same to your ortaor; and your orator states that said Isett & Brewster approved of and assented to said letter and the terms thereof, and to the statements therein contained, and then and there consented and agreed to hold said securities therein referred to in trust for your orator, in accordance with the terms of said letter.

And your orator further states that said Isett & Brewster thereupon accepted and received of and from said Butler said mortgage and promissory notes for ten thousand dollars in trust and confidence, to hold the same for the benefit and use of your orator; and in trust to deliver said notes, duly assigned, without recourse, together with said mortgage, to your orator when and as they should be directed by said Butler.

And your orator further states that in consideration of such delivery to them, by said Butler, of said notes and mortgage, and of the premises as above stated, they agreed and promised to hold said securities in trust solely for your orator, and to deliver the same to him in manner as aforesaid.

And your orator further states that the sole consideration
8 for the making of said deed of mortgage and notes was said Butler's indebtedness to your orator, and the said agreement to give your orator said security, and for forbearance as before stated; and your orator states and charges the fact to be that no consideration whatever was ever paid or given to said Butler by said Isett & Brewster for said mortgage and notes, or any part thereof.

And your orator further states, that on or about the ninth day of December, A. D. 1865, at the request of your orator, the said Sage O. Butler ordered and directed the said Isett & Brewster to execute and perform the said trust, and their said agreement in that behalf, and to deliver to your orator the said mortgage, together with said five promissory notes, duly assigned to them, without recourse, which order and direction were in writing, and as follows:

Messrs. ISETT & BREWSTER:

GENTS: Having, on the sixteenth day of March last, placed in your hands certain securities to be held in trust for such of my creditors as I might afterwards designate, and for the description of such
9 securities see my title of April 24th, 1865, to Jas. W. Finley, of Chicago, Ill., annexed to this, which was submitted to you for your approval before mailing, and then to be delivered by

you to them, I now designate Mr. Jas. W. Finley, of Chicago, as the person to receive said securities from you, and you will therefore, in execution of said trust, please deliver the same to Mr. Jas. W. Finley, or his agent.

Yours, resp.,

SAGE O. BUTLER.

Chicago, Dec. 9, 1865.

Which order and direction was made and given by said Butler to said Isett & Brewster, at their banking house in Muscatine aforesaid, on or about the twelfth day of December last.

And your orator further states that immediately thereafter your orator demanded of them, the said Isett & Brewster, the said securities, and requested them to deliver the same to him, in the manner provided for in and by said trust, and their promise and agreement in that behalf.

And your orator further states that upon said order and direction being given to them by said Butler, and upon your orator
10 demanding of them the delivery of the said securities to him, in the manner provided for in and by said trust, and as before set forth, the said defendants, Isett & Brewster, fraudulently and in bad faith, refused to deliver or give up to your orator or to said Butler said securities, or any part thereof, and to execute said trust, and to perform the said promise and agreement in relation to said securities.

And your orator further states that at the time of refusing to deliver to your orator said securities, to wit, on the twelfth day of December, A. D. 1865, the said mortgage and five notes for ten thousand dollars were of the cash and market value of ten thousand five hundred dollars, or thereabouts.

And your orator further states that in virtue of the facts above set forth, and of the delivery by said Butler to said Isett & Brewster of said martgage and notes in trust for the purposes above stated, and of the acceptance by said Isett & Brewster of said securities, upon such trust and confidence, and of their agreement faithfully, and in all things, to execute the same in good faith, a trust was created thereby, and thence arose in favor of your orator, which said Isett & Brewster are bound in all things to perform.

11 And your orator further states that from the time of receiving said notes and mortgage, and until within a short time of said refusal, said Isett & Brewster held, and professed to hold, said securities in trust, as above stated, for your orator, and never, until shortly before said refusal, pretended or claimed to have any interest of their own in and to the same, or any part thereof, other than as trustees as aforesaid.

And your orator further states that in a conversation with said Butler, some time in the month of June or July last, the said William C. Brewster admitted and stated to said Butler that if he were put upon the stand as a witness, and compelled to testify in a certain suit then pending in the Muscatine District Court of Iowa between said Isett & Brewster and said Butler, of the one part, and one H. M.

Holden, of the other part, in which suit was involved a claim of ownership and title by said Isett & Brewster to seven hundred barrels of pork, he, the said Brewster, should testify and swear, if inquired of in relation to said securities, the subject of this bill;
12 that they, the said Isett & Brewster, held the same in trust for other parties, namely, for your orator, and that they did not own, nor claim to own, nor hold the same in their own right, nor as security for any debt or obligation, on the part of said Butler, to them or either of them.

And your orator further states that some time in the month of October last, in a conversation held at their banking house, at Muscatine, with one Higgins, said Higgins inquired of said Isett & Brewster in relation to certain claims which said Isett & Brewster then made upon said Butler, and what securities they held from said Butler therefor. In answer to which inquiry said Brewster admitted and stated to said Higgins that they held certain pork as such security for their claims; that thereupon said Higgins inquired if they did not hold said mortgage and notes for ten thousand dollars as security for themselves; to which inquiry said Isett & Brewster, speaking in the person of said Brewster, answered and stated to said Higgins, in express terms, that they simply held said mortgage and notes in trust for another party, namely, your orator, and not otherwise, or for their own benefit or behoof.

13 And your orator states and charges that said Isett & Brewster until lately, and about the time of said demand upon them and their refusal to comply with the same, as above stated, had always stated and represented, whenever spoken to or inquired of in relation to said securities, that they only held said securities in trust for the real owner, and that your orator was the real owner of those securities in equity.

And your orator further states that said Isett & Brewster have lately given out and pretended, and do now pretend, that they are the sole, real, and absolute owners of said notes and mortgage for ten thousand dollars, and of the money thereby secured to be paid, and have also lately and within a few weeks of the filing of this bill; set up a claim that said Butler is indebted to them in the sum of six thousand dollars or thereabouts, and claim that they hold, and are entitled to hold, said mortgage and notes, and to be entitled to a lien upon the same as security, by way of pledge or hypothecation for the payment of said Butler to them of their said pretended debt.

And your orator well hoped that said Isett & Brewster would
14 execute the said trust, and deliver the said securities to him upon such his said demand upon them so to do, as in justice and equity they ought to have done. But now, so it is, may it please your honors, that the said Isett & Brewster, combining and confederating with the said Butler, and with divers other persons at present unknown to your orator, whose names, when discovered, your orator prays that he may have liberty to insert herein with apt words, to charge them as parties defendant hereto, and, contriving how to wrong your orator in the premises, absolutely refuse to per-

form the said trust toward your orator, and absolutely refuse to acknowledge the existence of said trust in favor of your orator and your orator's right to have said securities delivered to him, and absolutely refuse to deliver to your orator said mortgage and notes, or any of them indorsed by them, without recourse, as aforesaid; and also absolutely refuse to hold said mortgage in trust for your orator, or to exercise or execute the powers thereby vested in them for his use or benefit, or to account to your orator for the same, or
15 the value thereof, or of any part thereof, sometimes pretending that they received and held said securities from said Butler under an agreement with him that the same should be held by them as security for any balance of debt that might be owing to them from said Butler, and that said Butler is indebted to them in the sum of six thousand dollars or thereabouts, and that they are entitled to hold said securities for said debt, and until the same is paid in full. And at other times they pretend that they hold and own a prior mortgage and debt, secured thereby upon said real estate and premises, for the sum of eight thousand dollars or thereabout, which they allege and falsely pretend is a valid and subsisting debt and charge upon said premises; the contrary of all which several allegations and pretences your orator charges to be true.

And your orator expressly charges that said Isett & Brewster did not receive said mortgage and notes, nor any thereof, nor any part thereof, under any agreement with him or any one, express or implied, that the said securities, or any part thereof, should be held by them as security for any balance of debt that might be owing to them by said Butler.

16 And your orator charges that it is wholly untrue that said Butler is now indebted to them or either of them in the sum of six thousand dollars or thereabout, or in any other sum for which they are entitled, in any way or by any means, to hold said mortgage and notes, or part thereof, as security for payment thereof.

And your orator expressly charges that said pretence of said Isett & Brewster, that they held a prior unsatisfied mortgage upon said premises, is wholly false and fraudulent.

And he further charges that if, at any time, said Butler had made any mortgage upon said premises, prior to the mortgage herein in question, that the same was duly and fully satisfied and paid, and all the money due therein, as well for principal as interest, by said Butler at its maturity, and long before the execution of said mortgage and notes for ten thousand dollars in March last as aforesaid, and that such prior mortgage, with the notes secured thereby, was, when the same and the sum due thereon was so paid and satisfied by said Butler, was given up and delivered by the owner
17 thereof to him, said Butler, and cancelled; that the same and no part thereof is not, and was not, when said ten thousand dollar mortgage and notes was made by said Butler, in March last, a lien, charge, or incumbrance upon said premises, nor any part thereof.

And he further expressly charges that if said Isett & Brewster

have or hold any such prior notes or mortgage in their possession as above pretended, that their possession and holding of the same is surreptitious and fraudulent, both against said Butler and your orator, and that such prior notes and mortgage are absolutely null and void.

All which actings and doings and pretences are contrary to equity and good conscience, and manifestly tend to the wrong and injury of your orator in the premises.

In consideration whereof, and because your orator can only have adequate relief in the premises in a court of equity, where matters of this nature are properly returnable and cognizable, to the end, therefore, that the said Thomas M. Isett, William C. Brewster, and Sage O. Butler, and their confederates, when discovered, may,

18 (the said Sage O. Butler upon his corporal oath, but the said Thomas M. Isett and William C. Brewster without oath, their answers under oath being hereby expressly waived by the said complainant,) to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were repeated, and they, and every and each of them, were distinctly interrogated thereto, and more especially that the said defendants may in manner aforesaid answer and set forth specially—

Whether said Butler was not, in the month of March last, indebted to your orator in the sum and amount first above mentioned; or, if not in that sum, in what other sum or amount?

2. Whether, in consideration of being so indebted to him, said Butler did not agree and promise to give your orator security for the payment of said debt, by way of mortgage upon his said real estate and pork-house above described?

19 3. Whether said Butler did not shortly or at some time thereafter, in pursuance of such his said promise and agreement, to give to your orator such security and in the designed performance of his said promise, after having duly signed said mortgage and notes for ten thousand dollars, deliver the same to said Isett & Brewster in trust, that when, and as directed by him, they should deliver the same in manner aforesaid to your orator?

4. Whether said Isett & Brewster did not consent, agree, and promise to receive and hold said securities upon trust and in confidence, to deliver the same to your orator when and as said Butler should order and direct them in that behalf?

5. Whether at the same time, and as a contemporaneous act, said Butler did not write and send to your orator said letter of April 24th, 1865?

6. Whether, before sending the same to your orator, said Butler did not read the same to said Isett & Brewster, or hand the same to be read by them?

7. Whether they did not read and otherwise well know the contents of said letter at the time, and also that said Butler was then largely, as above, indebted to your orator, and then presently unable to

pay; and that said Butler had agreed, in consideration thereof,
20 to give to your orator security, by way of mortgage upon his said property for said debt? And

8. Whether, knowing said facts, the said Isett & Brewster did not receive from said Butler said mortgage and notes for ten thousand dollars, in confidence and upon trust, to deliver the same, duly assigned by them, without recourse to your orator, when, and as ordered and directed by said Butler to do so, or when or how otherwise?

9. Whether the sole consideration for Butler making said notes and mortgage was not his being so indebted, as aforesaid, to your orator; if not that, what other or different consideration therefor ever existed or was made, paid, given, and upon what did such other consist of, and when was it paid, or given at all, and under what circumstances, answering fully as to the notice thereof, and all the facts concerning the same?

10. Whether said Butler did not, on or about the twelfth day of December last, order and direct said Isett & Brewster to perform said trust in favor of your orator, and to give up and deliver said securities to him?

21 11. And whether your orator has not demanded of them, said Isett & Brewster, due performance of said trust in good faith in his favor? And

12. Whether they have not utterly refused to comply with said order of said Butler and to execute said trust, and to deliver to your orator said securities, as provided for in and by said trust and their agreement in that behalf?

13. And whether said Isett & Brewster did not, until within a short time past, when inquired of or spoken to about said mortgage and notes, state and affirm that they only held the same in trust for the real owner thereof, and that your orator was in equity the owner thereof and solely entitled thereto?

14. And more particularly whether said Brewster did not, in the month of June or July last, state to said Butler that if called upon to testify or inquired of as a witness in said suit, with Holden, above referred to, in relation to said mortgage and notes, and how and by what title said Isett & Brewster held the same, state and admit to said Butler that he should swear, and should have to swear,
22 that they, said Isett & Brewster, only held said securities in trust for another party, and not own them in their own right, or under a lien upon the same in their own favor, or words to that effect; and also, whether said Brewster did not, in or about the month of October last, or some other time, admit and state to the said Higgins that they, Isett & Brewster, did not own said mortgage and notes, or any part thereof, or to hold the same for their own benefit in any way, but only in trust and for the benefit of another party, or words to that effect?

15. And whether, before the month of October last, they ever set up any title to, or claimed to be the owners of, said securities in their own right, or otherwise than solely as trustees of and for your orator?

And your orator further prays that upon due proof being made of the facts and allegations of this, his bill, to the satisfaction of the court, that it may be declared, ordered, and adjudged by this honorable court that said Isett & Brewster held said mortgage and notes for ten thousand dollars, and received the same solely as trus-
23 tees and in trust for your orator, as hereinbefore set forth, and that your orator is entitled to have the same delivered to him, indorsed and properly assigned to him, so as to be fully available in his favor, both at law and equity; and that not only may said Isett & Brewster assign and deliver over to him said promissory notes, but also make, sign, seal, acknowledge, and deliver to him an assignment of said mortgage, by executing and properly acknowledging a proper deed of conveyance of said mortgage promises, so as to vest fully in your orator the legal estate thereof, and all powers vested by said mortgage and intended to be exercised to carry the same into effect, and to make the same a valid and effectual security for said debt and notes; or that in default thereof, that said Isett & Brewster be ordered and adjudged to pay to your orator the whole and full amount of said mortgage and notes, and the same secured thereby, with interest thereon from the time of making the same; and that your orator may have such other and further relief in the premises as to your honors may [may] seem meet and the circum-
24 stances of this case shall require.

And your orator further prays that a writ of injunction, issuing out of and under the seal of this honorable court, may be granted and directed to the said Isett & Brewster, restraining and expressly commanding them, their solicitors, attorneys, agents, and servants, until the further order of this court herein, not to alienate, charge, incumber, dispose of, or assign said mortgage and notes, or either or any part thereof, to any other person than or beside your orator; and not to remove the same, or any part thereof, beyond the jurisdiction of this court, until the final determination of this cause.

May it please your honor, to grant unto your orator a writ of subpœna, to be directed unto the said Sage O. Butler, Thomas M. Isett, and William C. Brewster, thereby commanding them and each of them to be and appear before this honorable court, at Des Moines, on the first Monday of April, A. D. 1866, and then and there full,
25 true, direct, and perfect answers make to all and singular the premises and further to stand to, abide, and perform such further order, direction, and decree therein, as to your honor shall seem meet and the circumstances of this case shall require. And as in duty bound, your orator shall ever pray.

JAS. W. FINLEY.

ARTHUR U. WINDETT,
JACOB BUTLER,
Sol'rs of Counsel for Complainant.

United States Circuit Court for the district of Iowa, [district of Iowa.]

UNITED STATES OF AMERICA *ss:*

James W. Finley, the complainant in the above bill of complaint, being first duly sworn, maketh oath and saith that he has read the said bill of complaint and knows the contents thereof, and that the averments and facts therein stated are true in substance and facts as therein stated, to the best of his knowledge and belief, save such matters and facts as are therein stated from information and
26 belief, and that as to such he is informed and verily believes that the same are true.

JAS. W. FINLEY.

Subscribed and sworn to before me this 10th day of January, A. D. 1866, as witness my hand and the seal of the Circuit Court of the United States for said northern district of Illinois, at Chicago, the day and year last aforesaid.

[COURT SEAL] WM. H. BRADLEY, *Cl'k.*

[5 c't rev. stamp.]

27 *Exhibit A.*

Know all men by these presents, that I, Sage O. Butler, of Muscatine county, State of Iowa, in consideration of the sum of ten thousand dollars, ($10,000,) in hand paid by Thomas M. Isett and William C. Brewster, of Muscatine county, State of Iowa, the receipt whereof is hereby acknowledged, do by these presents, grant, bargain, sell, andconvey unto the said Isett & Brewster, their heirs and assigns forever, the following described premises situated in the county of Muscatine and State of Iowa, to wit:

First. Out-lot number two, (2,) in section number two, (2,) in township number seventy-six (76) north, of range No. two (2) west of the fifth principal meridian, containing two 42-100 acres, more or less.

Second. Also the west ten feet of out-lot one, being a strip on the west side of said lot ten feet wide, running the whole depth of the lot, to the centre of the slough, also all buildings thereon and machinery thereon, said property being known as "Butler's Pork-House;" to have and to hold the said premises unto the said Isett & Brew-
28 ster, their heirs and assigns, forever; and the said Sage O. Butler does hereby covenant with the said Isett & Brewster, their heirs and assigns, that he is lawfully seized of said premises; that they are free from incumbrances; that he has good right and lawful authority to sell the same; and he does hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever.

Provided, however, that if the said Sage O. Butler shall well and truly pay to said Isett & Brewster five certain promissory notes, executed by the said Sage O. Butler to said Isett & Brewster, bearing even date herein, for two thousand dollars each, with interest at 6 per

cent per ann., at one, two, three, four, and five years [from?] date, then this deed to be null and void.

In witness whereof he hath hereto set his hand and seal this 16th day of March, A. D. 1865.

[L. S.] SAGE O. BUTLER.

[U. S. int. revenue S. O. B., 3-16, 1865, one dollar.]
[U. S. int. revenue, S. O. B., 3-16, 1865, one dollar.]
29 [U. S. int. revenue, S. O. B., 3-16, 1865, one dollar.]
[U. S. int. revenue, S. O. B., 3-16, 1865, one dollar.]
[U. S. int revenue, S. O. B., 3-16, 1865, one dollar.]
[U. S. int. revenue, S. O. B., 3-16, 1865, one dollar.]
[U. S. int. revenue, S. O. B., 3-16, 1865, one dollar.]
[U. S. int. revenue, S. O. B., 3-16, 1865, one dollar.]
[U. S. int. revenue, S. O. B., 3-16, 1865, one dollar.]

STATE OF IOWA, *Muscatine County:*

I do hereby certify that before me, D. C. Richman, notary public in and for said county, personally appeared the above-named Sage O. Butler, who is personall known to me to be the identical person whose name is affixed to the above conveyance as grantor, and acknowledged the same to be his voluntary act and deed for the purpose therein mentioned.

30 Witness my hand and notarial seal this 3d day of April, 1865.

[SEAL.] D. C. RICHMAN,
Notary Public.

THE STATE OF IOWA, *Muscatine County, ss:*

I, Charles S. Foster, recorder of deeds in and for said county, do hereby certify that the above and foregoing is a full, true, and complete copy of the mortgage deed from the said S. O. Butler to the said Isett & Brewster; that the same was filed in the recorder's office of said county, for the purpose of being recorded therein, on the 4th day of April, A. D. 1865, at 9 o'clock a. m.; and that the same is recorded in Book "W," of Town Lots, on pages 607 and 608, of the records of said county, as the same now remains in my office.

CHARLES S. FOSTER,
Recorder Mus. Co., Iowa.

[5-cent int. rev. stamp.]

Know all men, that whereas Sage O. Butler heretofore executed to Thomas M. Isett and William C. Brewster, constituting the
31 firm of Isett & Brewster, a mortgage upon the pork-house property of said Sage O. Butler, situated in the city and county of Muscatine, State of Iowa, and particularly described in said mortgage, to [which] reference is hereby made, said mortgage being executed to secure the sum of ten thousand dollars and interest, and being dated March 16, 1865, and recorded April 4th, 1865, in Book "W" of lots, of the records of said county, pages 607 and

608; and whereas I, Mary A. Butler, wife of the said Sage O. Butler, neglected to join in the execution of said mortgage, and release my dower therein: Now, therefore, I, the said Mary A. Butler, in consideration of the premises and the sum of fifty dollars, do hereby release and relinquish unto the said Thomas M. Isett and William C. Brewster, their heirs and assigns, all my right of dower in and to said pork-house property and appurtenances, as described in said mortgage, upon the terms and conditions therein set forth.

Witness my hand and seal, this 15th day of July, A. D. 1865.

[SEAL.] MARY A. BUTLER.

32 STATE OE IOWA, *Muscatine County:*

Before me, D. C. Richman, a notary public in and for said county, this day personally came Mary A. Butler, to me personally known to be the identical person whose name is affixed to the within conveyance as grantor, and acknowledged the instrument to be her free and voluntary act and deed.

Witness my hand and notarial seal, this 15th day of July, A. D. 1865.

[SEAL.] D. C. RICHMAN, *Notary Public.*

U. S. int. revenue.
M. A. B. July 15, '65.
Fifty cents.

THE STATE OF IOWA, *Muscatine County:*

I, Charles S. Foster, recorder of deeds in and for said county, do hereby certify that the above and foregoing is a full, true, and correct copy of the instrument executed by the said Mary A. Butler, by which she relinquished her right of dower in and to the property therein described; that the same was filed for record in the
33 recorder's office in said county, on the 15th day of July, A. D. 1865, at 2½ o'clock p. m.; and that the same is recorded in Book No. 1, of Town Lots, on pages 136 and 137, of the records of said county, as the same now remains in my office.

Dec. 19, 1865. CHARLES S. FOSTER,
Recorder Mus. Co., Iowa.

[Five-cent revenue stamp.]

This bill is endorsed: "Filed Jan'y 22, 1866. W. G. Woodward, clerk C. C. U. S."

And afterward, on the same day, a subpœna in chancery was issued from the said clerk's office, in the words and figures following, to wit:

34 *Subpœna in chancery.*

UNITTED STATES OF AMERICA, *District of Iowa, ss:*

The President of the United States to Thomas M. Isett, William C. Brewster, and Sage O. Butler, greeting:

We command you and each of you, that you appear before the judges of the Circuit Court of the United States for the district of Iowa, at Des Moines, on the first Monday, it being the 2d day of

April next, A. D. 1866, to answer to the bill of complaint of James W. Finley, a citizen of the State of Illinois, this day filed in the office of the clerk of said court, and then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced agsinst you bv default.

To the marshal of the district of Iowa: Returnable to the first Monday of April, A. D. 1866.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the U. S., at Des Moines, this the 22d day of January, A. D. 1866, and of the independence the 90th year.

[SEAL.] W. G. WOODWARD, *Clerk.*

Memorandum.

The within-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Des Moines aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against them as confessed, and a decree entered thereon accordingly.

W. G. WOODWARD, *Clerk.*

Endorsed: No. 63, eq. Circuit Court of the United States, district of Iowa. James W. Finley *vs.* Thomas M. Isett, Wm. C. Brewster, and Sage O. Butler. Subpœna in chancery. Returnable to rule day, first Monday in April, A. D. 1866. W. G. Woodward, clerk. Filed April 2d, A. D. 1866. W. G. Woodward, clerk. J. Butler, comp't's sol.

35 Upon which writ of subpœna were the following endorsements, viz:

"I hereby authorize and appoint M. B. Hoxie to serve the within subpœna.

"PETER MELENDY,
"*U. S. Marshal for District of Iowa.*"

"This subpœna came into my hands this day of Feb'y, 1866, and on the 10th day of March, 1866, I served the same on the within named William C. Brewster and Sage O. Butler, by reading the same and delivering a copy to them respectively, at the city of Muscatine, in the county of Muscatine and State of Iowa. The said William C. Brewster demanded a copy of the petition. Same [not] being in possession, I did not deliver one, but notified the clerk of the facts, the attorney of the plaintiff being unknown to me. The within-named Thomas M. Isett not being within my bailiwick.

"PETER MELENDY,
"*U. S Marshal, Iowa.*
"By M. B. HOXIE,
"*Special Dep'ty.*"

Marshal's fees:

Service	$4 00
185 miles	11 10
Copy	1 00
	16 10

36 And afterwards, on the 24th day of April, A. D. 1866, was filed the separate answer of Wm. C. Brewster, one of the respondents, in the words and figures following, to wit:

In the Circuit Court of the United States for the district of Iowa.

The separate answer of Wm. C. Brewster to the bill of complaint of the said James W. Finley, against him and others in the said court exhibited.

JAMES W. FINLEY
v.
THOMAS M. ISETT, WM. C. BREWSTER, and SAGE O. BUTLER.

This defendant now, and at all times hereafter, saving to himself all manner of benefit and advantage of exception to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereto, or to so much and to such parts thereof as he is advised it is material or necessary for him to answer to, answering, says:

He admits that he and the said Tho's M. Isett, a co-defendant herein, were on the 16th day of March, A. D. 1865, co-
37 partners in the banking business, at the city of Muscatine, in the State of Iowa; but he says that such partnership ceased and determined by limitation on the 16th day of May of that year, and became at, and has been since, that time dissolved.

He admits that Sage O. Butler, a defendant herein, on or about the 16th day of March, A. D. 1865, made his five certain promissory notes of that date for the sum of two thousand dollars each, and payable to the order of the said Isett & Brewster, in one, two, three, four, and five years, respectively, with interest at six per cent. per annum, and that for the purpose of securing said notes, the said Butler executed the mortgage described in said bill, and then, or shortly thereafter, delivered the said notes and the said mortgage to the said Isett & Brewster, who were the payees of said notes, and the grantees of said mortgage; but this defendant denies that said securities were given to or accepted by the said Isett & Brewster on the agreement or understanding that they were to hold the same in trust for the complainant, or that the said securities were to
38 be by them assigned when and to such persons as the said Butler should direct.

And this defendant avers that the said Butler was then, on the said 16th day of March, when the said securities were made, indebted to the said firm of Isett & Brewster, for and on account of moneys by said firm loaned and advanced to said Butler, in the sum of eleven thousand and seventy-five 13-100 dollars, ($11,075 13-100,) without computing interest due on such loans and advances; that the said securities were given to and taken by the said firm of Isett & Brewster, for their own use and benefit, and in consideration of, and to secure in part, the indebtedness then by the said Butler

owing to them ; that the only understanding and agreement between the said Isett & Brewster and the said Butler, touching the said securities and the purposes for which the same were made and delivered and the uses to which they were to be applied, went no farther than this, that the said Isett and Brewster were to hold the said securities as security in part for the indebtedness of said Butler to them; that they were not to enforce them until other securities,
39 which they then held of said Butler, were exhausted or proved unavailing and valueless ; that if said Butler paid up his said indebtedness to them, they were not to cancel said securities, but to hold them in trust for such person as the said Butler should name, and deliver them over to such person, assigned without recourse, when required so to do; or if the indebtedness of the said Butler to them were paid by any creditor of said Butler, with his approval, then to assign such securities, without recovrse, to the creditor so paying them. This defendant says that this was the extent and quality of any trust or confidence reposed in, or mentioned to, or accepted by, the said Isett and Brewster, in so far as the said securities were concerned; that the trust, if trust it can be called, was contingent, and [and] dependent on the said indebtedness due to them being paid, and that until such payment, such trust cannot arise in favor of, nor, as this defendant is advised, cannot be enforced by any creditor of said Butler; and he farther says that said Isett & Brewster would not have accepted such securities without their being the beneficiaries thereof in fact, as well as in
40 name; that they did not consent, nor would they have consented, to receive and to hold said securities for others, to the exclusion of their own interests as creditors of said Butler.

This defendant, further answering, says that the alleged letter of the said Butler to the complainant, dated at Muscatine, April 24, 1865, a copy of which letter the said bill purports to contain, was not, as alleged by said bill, read by, or the statements set forth therein made known to the said Isett & Brewster, before the same was, by the said Butler, sent to the complainant; and this defendant says that the first information or knowledge which the said Isett & Brewster, or either of them, had of the writing or sending of such letter, was through the letter of said Butler to the said Isett & Brewster, dated at Chicago, December 9th, 1865, and copied in said bill, or nearly eight months after the alleged date of said first-named letter; that if, as charged, the said alleged letter was handed to the said Isett & Brewster before the same was sent, it was not read by them, or by either of them, nor were the alleged contents
41 thereof communicated to them, or either of them, and that if any such letter were written and sent they were entirely ignorant of it until the receipt, by this defendant, of the said letter of December 9th, 1865, whereupon he says that the said Isett & Brewster did not approve, nor did they assent to, the statements in such letter alleged to be contained, nor did they thereby agree and consent to hold said securities in trust and confidence for complainant.

This defendant, further answering, says that he had had, after the date of the said alleged letter, and before the said letter of the 9th of December was written, two interviews with the complainant, one in the month of May, the other in the month of October of last year, and also some correspondence; that the interview, in the month of May, was in the city of Chicago, and was of brief duration; that the interview, in the month of October, was in the city of Mustine, at the house and in the presence of said Butler; that at this last-mentioned interview, this defendant stated to the com-
42 plainant the amount of indebtedness then owing by the said Butler to the late firm of Isett & Brewster; that such indebtedness had been reduced to about the sum of six thousand dollars, exclusive of interest; the promise and agreement they, the said Isett & Brewster, had made with the said Butler concerning the said securities, to wit, on the payment of their said claim by himself, to assign the said securities over to such person as he might name, or on the payment by any creditor whom the said Butler should designate, then to make such assignment to such creditor; that the claim aforesaid of the said Isett & Brewster was first to be paid before any disposition could be made of such securities, and then only such disposition as the said Butler should direct; all which was assented to and approved by the said Butler, and the right to said property in the said securites, as the first beneficiaries thereof, of the said Isett & Brewster, was, by the said Butler, fully recognized and admitted; and this defendant says, that the rights of the said Isett & Brewster, in and to the said securities, and their
43 paramount interest therein, to the extent of their said claim, were fully stated to, understood, and acquiesced in by the said complainant; and this defendant says, that there was not during said interview, nor before, nor after the same, until the s'd 9 of December following, anything said by the complainant or the said Butler, of the said alleged letter of the said Butler to the complainant, of April 24th, preceding, and which it is alleged was shown to, and the statements therein alleged to have been approved by the said Isett & Brewster before the same was sent; and this defendant further says, that after the receipt by him of the said letter of the said Butler, of the said 9th day of December, he inquired of complainant why, in the interviews and correspondence aforesaid had by this defendant with complainant, complainant had not mentioned or made some allusion to the said alleged letter of April 24th, so alleged to have been shown to, and approved by, the said Isett & Brewster, to which the complainant replied by pointing or referring to the request at the conclusion of said alleged letter, to wit,
44 the request of the said Butler to the complainant, to keep the contents of said letter confidential.

This defendant says, that in all his interviews with the said complainant, he practised no concealment, and in no manner attempted to mislead the complainant with respect to the interest of the said Isett & Brewster in said securities, and the nature, quality, and extent of any trust or confidence they had agreed with the said Butler

to exercise in relation thereto; that, as this defendant understood, and as the whole tenor of the conversation that passed between complainant, this defendant, and the said Butler at the said last-mentioned interview, fully indicated the object and purpose of complainant's visit to Muscatine, was to look after and to secure and protect, as far as he could, his alleged claim against the said Butler; that this defendant was invited to see complainant in aid of his said object, and to make or concur in some arrangement with him, whereby his said alleged claim against the said Butler might be placed in a more favor-
45 able or less uncertain condition; and this defendant then proposed to complainant to pay off the claim of the said Isett & Brewster, and take an assignment of the said securities, and thereby secure to himself the benefit and control of the same; and this defendant says, that his proposition, for the complainant to pay off said claim and to take the said assignments, then and there met the full approbation of said Butler, who, as a further inducement for complainant to accept the same, offered to give the complainant another and additional mortgage on the same premises for the further sum of ten thousand dollars; and this defendant says, that the said complainant seemed to regard the said proposition with favor, and would consider over it, and consult about it, and hold it under advisement.

And this defendant, further answering, says that after the said interview, and after the complainant had returned to his home in Chicago, he addressed to the said Butler a letter, of which the following is a copy:

CHICAGO, *Oct.* 20, 1865.

46 MR. S. O. BUTLER.

DEAR SIR: "Since my return home, I have thought over Mr. Brewster's proposition, and don't see that I can better my situation by paying his mortgage. It would give me a clean title to the property, which would be very desirable; but as I understand you and Mr. Brewster, the mortgage was given with the intention of protecting my interests as well as Mr. B. When Mr. B's claim was satisfied, the transfer of the property to be made to me. This is the way I understand my position now. If I am not correct, I want you to inform me. You have always assured me that my interest should be taken care of, and I shall expect it.

"Yours truly,

"JAMES W. FINLEY."

And this defendant says, that the mortgage in the above letter referred to is the said mortgave given by the said Butler to the said Isett & Brewster, as security for the notes hereinbefore mentioned, and that the understanding of complainant, as set forth in his
47 said letter, as to the time when, and the circumstances under which the said securities were to be transferred to him, to wit: "When Mr. B's claim (meaning and intending thereby the said claim of the said Isett & Brewster) was satisfied, the transfer of the property to be made to me," [complainant,] was, and had been,

and still is the understanding upon which the said Isett & Brewster held and now hold the said securities to this extent; that such transfer was to be made to the person named and determined by the said Butler, and the payment of the said claim of the said Isett & Brewster was, as it still is, a condition precedent to such transfer. This defendant further says that, thinking that complainant had, in the interview aforesaid, (and to which the said letter refers in speaking of this defendant's proposition,) not fully conceived his meaning; this defendant, on reading the foregoing letter, which was shown him by the said Butler shortly after its receipt by him, addressed to the complainant a letter, of which the following, if not in the identical words, is substantially a copy:

48 MUSCATINE, *Oct'r* 25, 1865.

J. W. Finley, esq., Chicago.

DEAR SIR: Mr. S. O. Butler has just shown me your letter relative to the conversation we had when you were here. My understanding is somewhat different from yours.

I proposed to you, (subject to Mr. Butler's approval,) that if you paid my claim *vs.* Butler, say $6,000, I would assign to you the bank claim and the 1st $10,000 mortgage. Mr. Butler objected, saying he wished to control the bank claim, but would substitute for that claim a second $10,000 mortgage.

That is, upon your paying me $6,000, you should have a first and second $10,000 mortgage. I have had a long talk with Mr. Butler this morning, and told him that I thought my proposition to you—the bank claim and the first mortgage—more to your advantage than the two mortgages, and that if he wished to protect you first, he had better sanction my proposition. He told me he would do so, and to write to you to that effect. If you think best to accept, please
46*a* place $6,000 to my credit with Geo. Sturges, cashier, and I will make such disposition of the bank claim and the 1st mortgage, $10,000, as you may direct.

Please advise me at your earliest convenience, as Mr. Butler wishes to make some arrangement with Mr. Higgins, who is now here, and said he would stay two or three days.

Very respectfully,

W. C. BREWSTER.

This defendant says that to the foregoing letter the complainant returned to him the following answer:

CHICAGO, *Oct.* 27, 1865.

Mr. W. C. Brewster, Muscatine.

DEAR SIR: Yours of the 25th inst. received. Your statement of the proposition you made me at Mr. Butler's house is correct. Mr. B. and I have had several previous conversations about the matter, and he has, in all cases, assured me that he would give me a mortgage on the property. The proposition you now make for Mr. Butler, that is, in consideration of my paying your claim of $6,000, you will trans-

fer to me your mortgage and your interest in the bank claim,
47*a* this I must decline. I prefer to take a second mortgage on the property to the proposition.

Yours truly,

JAS. W. FINLEY.

And this defendant says, that on the same day that the complainant's letter, replying to the previous letter of this defendant, was written, complainant wrote another letter to the said Butler, the same being apparently called forth by the said letter to the complainant of this defendant, of which letter to the said Butler the following is a copy:

CHICAGO, *Oct.* 27, 1865.

Mr. S. O. Butler, Muscatine.

DEAR SIR: I am in receipt of Mr. Brewster's letter of the 25th inst., and have answered it, declining the proposition he makes; that is, in consideration of my paying his claim of $6,000, he will transfer to me his mortgage of $10,000, and his interest in the bank claim. I prefer a second mortgage to this proposition.

In disposing of your property, I shall rely upon your pre-
48*a* vious promises; and if you cannot do any more for me, give me the second mortgage.

I will be pleased to know how you arrange your matters.

Yours truly,

JAS. W. FINLEY.

And this defendant says, that on the 24th day of October, 1865, before the complainant's letter to the said Butler, of the 20th of the same month, was answered by this defendant, (both the said letters being hereinbefore given at length, and probably before said letter was by the said Butler shown to this defendant,) the complainant wrote to the said Butler a letter, of which the following is a copy:

CHICAGO, *Oct.* 24, 1865.

Mr. S. O. Butler, Muscatine.

DEAR SIR: Yours of the 23d inst. received. In my letter of the 20th inst., I have reference to the mortgage of I. & B., and not to the second mortgage. I thought it was understood between you and I, that I was to have the additional mortgage of $10,000 on the property, whether I paid I. & B. mortgage or not. I did not think
49 that had anything to do with the second mortgage. The object in paying I. & B. claim was to get a clean title to the property. According to my understanding, you have no right to give that second mortgage to other parties. It was made for my benefit, and I expect it in fulfilment of your agreement. I cannot control I. & B. mortgage. If I was in a situation, I would advance their amount and take their mortgage; but it's not convenient to do so now, and therefore must let it rest for the present. I understood you to say that you held this second mortgage; and in case of any indications of suits, you would have it recorded for my benefit. I don't

understand that I was to pay I. & B. claim to get the second mortgage, but only the first; and in case I paid their claim, I would hold both. I think I have made my view plain this time, and hope to hear from you on receipt of this.

Yours truly,

JAS. W. FINLEY.

This defendant says, that the claim designated the bank claim in some of the foregoing letters is the claim spoken of in the complainant's said bill as the claim of one Holden, to seven hundred
50 barrels of pork, manufactured by the said Butler, and for which the said Holden held a warehouse receipt, which was executed with the knowledge, concurrence, and guaranty of the said Butler. And this defendant says that the right of the said Isett & Brewster to the said securities, and the priority of such right to the benefits of the same had been made known to, and was fully understood by, the complainant, at and before the writing of the said letters, and that such priority was fully admitted and recognized by the complainant as well before as at the writing of said letters.

And this defendant further answering says, that the demand made on them by the said Butler, to deliver the said securities to the said complainant, as expressed in the letter of the said Butler, dated at Chicago, Dec'r 9, 1865, and copied in the said bill, was long after the said interview with complainant at the house of said Butler, and after the writing of the said letters herein copied, of the said complainant to the said Butler and of his said letter to this defendant, and he says that the writing of the said letter of the said Butler
51 to the said Isett & Brewster, and the demand therein sought or attempted to be made of them, to deliver over the said securities to the complainant, and the attempted designation by the said Butler of the said complainant as the person to receive and use the same, was each and all of it without any authority of the said Isett & Brewster, or either of them; was the attempt, on the part of the said Butler, to exercise a power which he did not then and does not know possess, all of which was and is well known to the said complainant.

And this defendant says that to so much of said bill as alleges a conversation between the said Butler and this defendant in the month of June or July last, wherein it is charged that this defendant stated to the said Butler, that if he were put on the stand as a witness and compelled to testify in a cause then pending in the District Court of the State of Iowa, in which one H. M. Holden was plaintiff, and the said Butler and the said Isett & Brewster were defendants, in which was involved the right to seven hundred barrels of pork, this defendant would have sworn, if inquired of in relation to said
52 securities, that the said Isett & Brewster, or claim to own or hold the said securities in their own right, or as security for any debt or obligation on the part of the said Butler to them, or either of them; but that they held the same in trust for other parties, to wit, the complainant. He has no recollection whatever of any such conversation; nor does he conceive it possible that he could

have used any such language as is therein imputed to him, or any language from which it could fairly be drawn that the said firm of Isett & Brewster did not own or hold, or claim to own or hold said securities in their own right, or as security for any debt or obligation on the part of the said Butler to them, but in trust for other parties, when the contrary, as he has hereinbefore stated, was the fact, and when, as this defendant was advised, and as he believed, the right and interest of the said Isett & Brewster, in and to the said securities, could not properly be inquired of in the trial of the said cause, or in any manner affect the determination thereof, and he denies each and every statement contained in said bill of such alleged conversation.

And this defendant, further answering as to the alleged
53 conversation had between him and one Higgins, says that in the month of October last, about the time that defendant wrote his letter, herein given to the said complainant, one Higgins, of the firm of "Higgins, Dean & Co.," of Chicago, was at the said city of Muscatine; that he met the said Higgins several times, not at the banking house of said Isett & Brewster, as stated, for the said firm of Isett & Brewster had then become and was dissolved, but in the banking house formerly used and occupied by the said Isett & Brewster, and at other places in said city; that the said Higgins stated, and the said Butler admitted, that the said Higgins, Dean & Co. were creditors to a considerable amount of said Butler; that the said Higgins spoke to this defendant of the indebtedness of the said Butler to the firm aforesaid, of which he was a member, and expressed his wish and anxiety to have the same arranged or secured; that something was said, and some inquiry was made by the said Higgins of this defendant respecting the securities in the hands of, and held by, the said Isett & Brewster for their claim against said Butler; that this defendant, in answer thereto, stated to the
54 said Higgins the amount of the said Isett & Brewster's claim against the said Butler, namely, about six thousand dollars, without adding interest; that they mentioned said pork, being the same out of which the said suit of the said Holden originated, and the title and right to which, as this defendant then stated, was in litigation, and also the relationship held by the said Isett & Brewster to the said notes and mortgage; that they held the same as security for and until the payment of and satisfaction of their said claim; and this defendant stated likewise the nature, character, and quality of the trust they, the said Isett & Brewster, had agreed with the said Butler to observe, in connection with said securities, namely, that if their said claim were paid by the said Butler, then to assign and deliver over the said securities when and to whom the said Butler should direct; and if their said claim was paid by any creditor of said Butler, with the approbation of said Butler, then to assign and deliver the said securities to such creditor, and which this defendant avers was a true statement of their, the said Isett & Brewster's, interest in, and the purposes for which they then held, and now hold, said
55 securities, and of the circumstances under which they

were to dispose of them to other parties. And this defendant denies that he, in express terms, told the said Higgins that the said Isett & Brewster simply held said notes and mortgage in trust for another person, to wit, the complainant, and not otherwise, nor for their own benefit or behoof; and he avers that he spoke of the said securities, and the relation of the said Isett & Brewster to them, and of their interest in said securities, and of the nature, quality, and extent of the trust they had agreed with the said Butler to observe in the transfer thereof in no wise other or differently than as he has herein stated.

And this defendant further says, that after he had communicated to the said Higgins the rights which the said Isett & Brewster had to, and their beneficial interest in, the said securities, and when the same had been fully explained to, and was fully understood by, the said Higgins, the said Higgins offered to pay to this defendant the sum of five thousand dollars for their, the said Isett & Brewster's, claim on the said Butler, and an assignment to him of the
56 said securities, which this defendant refused to take, but told him that if he, with the approval of said Butler, paid the full amount of the said claim of Isett and Brewster, he would, in compliance with their agreement with said Butler, assign and pass over said securities, all of which this defendant says is wholly inconsistent with the statements charged in said bill to have been made by him to the said Higgins, of, and concerning said securities, in the said conversation.

This defendant, further answering, says that the request made of the said Isett & Brewster by the said Butler respecting the said securities, to wit, that if he paid his said indebtedness to said Isett & Brewster, they would not cancel and extinguish said securities, but would hold the same, until he would determine when and to whom they should be assigned; and when they were advised of such his determination, to assign and deliver, without recourse, in accordance therewith, and the promise of said Isett & Brewster so to do, and the further request of said Butler to the said Isett & Brewster not to assign the said securities to any creditor of the said Butler offering to pay their claim against the said Butler,
57 unless he consented thereto, and the promise of the said Isett & Brewster to observe and respect said request, created in the mind of this defendant a moral, if not a legal, trust and confidence in the said Isett & Brewster as to their disposal to other parties, of said securities; that the promises so by them made to the said Butler required that the wishes of the said Butler should be consulted and his assent obtained before they would undertake to assign and deliver the said securities to any creditor, who, by paying their claim, might desire to obtain the benefit of said securities; and so regarding the said securities as having connected with them a certain trust or confidence as herein stated, this defendant says that whenever the said securities have been spoken of, he has always spoken of a trust or confidence that was attached thereto; and he further says that when he has been inquired of by any credi-

tor of said Butler, or other person having a right to make such inquiry, touching the nature, extent, and quality of such trust, he has stated the same fully, and as herein set forth, and not otherwise.

58 And this defendant, further answering, says that in everything relating to the said securities, the said Isett & Brewster have, in all respects, acted in good faith and in accordance with the agreement and terms on, and the purposes for which they hold and have held said securities; and he denies all and singular the charges in the said bill contained or insinuated, of fraud, combination, or confederation with the said Butler or any other person, on the part of said Isett & Brewster, touching the objects and purposes of said securities and the conduct of said Isett & Brewster in relation thereto.

And, further answering, this defendant says that the balance of account for moneys had and received of the said Isett & Brewster by said Butler, and by them advanced to and used by the said Butler, was, on the 13th day of May, A. D. 1865, to five thousand and nine hundred and ninety-nine 48-100 dollars; that since that time no other or further payment has been made to them, or either of them, by or on account of the said Butler.

59 And this defendant says that the amount due to the said Isett & Brewster, by the said Butler, amounts, on the 13th day of May, A. D. 1866, with the interest agreed by the said Butler to be paid them for the use of the said money, to the sum of six thousand and five hundred and ninety-nine and 39-100 dollars; that for the payment of this sum they hold the securities aforesaid so by the said Butler payable made payable, granted, and delivered to them.

And, further answering, this defendant says that the said Butler has at divers times and in various modes recognised, admitted, and designated the said Isett & Brewster as the parties who were to hold and to realize the benefits of said securities, as well by the making and delivery to them of the same, wherein he, in express terms, designated the said Isett & Brewster as the holders and beneficiaries thereof, as at other times thereafter, in the presence and with the acquiescence and assent of [of] the complainant, and when the complainant was not present. And he says that the said Butler, in the month of July, of last year, while the said suit by the said Holden was pending, being anxious, or expressing anxiety,

60 to have the claim of the said Isett & Brewster against him paid off and discharged, proposed to this defendant to offer the said securities to the Merchants' Exchange, a company or corporation then existing in the said city of Muscatine, and engaged in the loaning of money and the business of banking, and to realize thereon, if it could be done, certain moneys, and out of the same to retain the amount of the said claim of Isett & Brewster; and this defendant, being desirous of adjusting and closing up the unsettled business of the said firm of Isett & Brewster, which was then dissolved, of which the said claim was part, assented to the proposition of the said Butler so, for the purpose aforesaid, made to him, and

presented the said securities to the said Merchants' Exchange, and asked the said Merchants' Exchange to advance thereon the requisite amount of money, which was not however done, although the said Merchants' Exchange expressed its willingness to loan and advance on the said securities the amount asked for, if the same were presented to it at a subsequent day, when it expected to be converted into a national bank, and would have bills or currency of its own, on or through which to operate.

61 And this defendant says that the said Butler, in his said proposal to this defendant, and the uses to which he designated the money, sought and expected to be realized from said Merchants' Exchange, by the hypothecation of said securities, admitted and recognized the said Isett & Brewster to be, and designated them as, the beneficiaries of said securities.

And this defendant further says, that even if it were true, as complainant has stated, that the said securities were made to, and deposited with, the said Isett & Brewster, in trust, and to the use and for the benefit of such person as the said Butler should afterward designate, which this defendant says was not the fact, yet that the said Butler repeatedly, and in a variety of modes, before the said 9th day of December, when his said letter to Isett & Brewster appears to have been written, admitted, recognized, and designated the said Isett & Brewster as the holders and owners, in their own right and for their own benefit, of the said securities; and he says that the said Isett & Brewster accepted and held, and have continued to hold, the said securities in that character and for that purpose.

62 And this defendant, further answering, says that to so much of said bill as charges that the said Isett & Brewster pretend to hold an unsatisfied mortgage prior, in point of time, to that claimed by the complainant and the subject of this suit, this defendant says that he has, as one of the late firm of Isett & Brewster, in his possession such a mortgage, but whether the same has been actually paid off and discharged or not, or whether any, and if any, how much of the indebtedness therein referred to is still unpaid, are matters unknown to this defendant, and, as he is informed, to his co-defendant herein, the said Isett; and he says that in so far as the said alleged prior unsatisfied mortgage is concerned, the said firm of Isett & Brewster never regarded the same as of any value, or relied or depended upon it as any security to them; that while the said firm or this defendant may have referred to it as among the securities they held of the said Butler, they were and are unwilling to consider it a reliable and valuable security. And this defendant further says, that said prior unsatisfied mortgage was placed in the hands of said Isett & Brewster by the said Butler without any understanding on their part, and that they received and have held the same at his request, and not because they considered it valuable, or that

63 they were expected or intended to resort to it for the payment of this said claim or any claim. And this defendant says, that no transfer of said last-mentioned mortgage, formal or otherwise, was ever made to the said Isett & Brewster, and that they

were always ready, and still are, to return the same to the said Butler. This defendant denies that the possession and holding of the said mortgage is in any manner surreptitious or fraudulent, as in said bill charged, either against the said Butler or the complainant.

And this defendant further answering, says that he appends hereto, as a part hereof, a statement of the account between the said Butler and the said Isett & Brewster, exhibiting the money transactions between them, from the 31st day of October, A, D. 1864, up to the 13th day of May, 1865, the date of the last payment to them by the said Butler, and the balance now due them by the said Butler, which amounted, on the 13th day of May aforesaid, to the sum of $5,99 44-100, and which, with the interest agreed by the said Butler to be paid thereon, namely, ten per cent. per annum, amounts, on the 13th day of May, A. D. 1866, to the sum of $6,599 38-100. This
64 defendant further answering, says that while, as hereinbefore stated, the agreement of the said Isett & Brewster with the said Butler authorizes the retention by them of all the securities now held by them until the full payment of their said claim; they are, nevertheless, willing to cancel, or return to, or otherwise dispose of, the two notes last maturing of said securities, as the said Butler may require.

And this defendant further answering, says that he does not, of his own knowledge, know what amount of indebtedness, if any, was owing to the said complainant from the said Butler, in the month of March, 1865, or about the time the said securities were executed and delivered to the said Isett & Brewster; but he was informed that the said Butler was then indebted to the complainant, and that the complainant had in his possession and under his control a large quantity of pork products, which had been shipped to the complainant by the said Butler, and was by the said complainant held as security for his claim against said Butler; that the value of said pork products, so held by him, was fully equal to the amount of his said claim; and this defendant says that whether, and to what ex-
65 tent, the said claim of complainant against the said Butler has been paid, and what amount, if any, the said Butler now owes to the said complainant, are matters of which he has no personal knowledge; but he says, and charges the fact to be, that the said complainant had in the said pork products full and ample security for his claim against said Butler, and that in his business engagements with the said Butler the said complainant neither expected nor intended nor stipulated for advances he might or did make to the said Butler, for any other or greater security than that furnished by the shipment and delivery to him of the said pork products, and the proceeds of the sales thereof.

And further answering, this defendant says that the said Isett & Brewster had no knowledge of any promise by the said Butler made to the complainant, to give to the complainant a mortgage on his real estate as security, until the interview hereinbefore spoken of between this defendant and the complainant at the house and in the presence of the said Butler, in October last, when the said Butler offered to give

the complainant a second mortgage, junior and subject to that
66 held by the said Isett & Brewster on the same premises; that if any such promise was, or had been made, before that time by the said Butler, such promise was a matter between the complainant and the said Butler, and was not communicated or made known to this defendant, or the said Isett & Brewster.

And this defendant further answering, says that the said Isett & Brewster are now, and have always been ready and willing to perform, discharge, and execute said trust, when the same shall arise, and according to the terms thereof, namely, when their said claim against the said Butler is paid by the said Butler, to assign without recourse, and deliver over said securities, as the said Butler may direct; or, if the said indebtedness shall be paid by the complainant, with the approval of the said Butler, to assign said securities in like manner to complainant.

And this defendant, protesting against the manner and form of the interrogatories in the complainant's said bill, and protesting against and denying the assumptions in said interrogatories contained,
67 answering further and particularly to the said interrogatories, says:

To the first interrogatory, says that he does not know of his own knowledge that said Butler was, in the month of March, of the year 1865, indebted to the complainant, but he has heard and presumes that he was so indebted, but in what sum this defendant does not know, and it he has heard, he has forgotton.

To the 2d int. he says that he first heard of such promise by the said Butler, in the month of October last, at an interview at the house of said Butler, between this defendant, complainant, and the said Butler, when the said Butler, as a consideration or inducement to the complainant to pay off the claim of Isett & Brewster against him, offered to complainant, in addition to the mortgage held by the said Isett & Brewster, on his real estate, and which, on complainant's payment of said claim, would be assigned to him, a second mortgage on the same premises, for the further sum of ten thousand dollars. If the said Butler made any promise to give the complainant a mortgage before that time, it was not known to this respondent.

68 To the 3d int. he says that the notes and mortgage specified in said interrogatory were not delivered to the said Isett & Brewster in trust, that when, and as directed by the said Butler, they should deliver the same to the complainant.

To the 4th int. he answers no.

To the 5th int. he answers that he does not know that the said Butler wrote any such letter a the time named, or at any time prior to the 9th of December, 1865.

To the 6th int. he answers that no such letter was read by the said Isett & Brewster at the time indicated, and if any such letter was handed to them, he does not know it.

To the 7th int. he says they did not read any such letter, or otherwise know its contents; that he had heard that the said Butler was indebted to his correspondents, of whom complainant was one, but

in what amount the respondent, if he then or afterward heard, he
69 cannot now remember. He cannot say if Butler was at that time unable to pay such indebtedness, but he understood that complainant had a large quantity of pork products shipped to him by the said Butler, upon which he could have realized; and he says he knows nothing of any agreement the said Butler had made to give complainant a mortgage on his real estate.

To the 8th int. he answers the said Isett & Brewster did not receive the notes and mortgage specified in confidence and upon trust to deliver them to the compiainant when and as the said Butler should direct them; that they received them as security for their own claim against him, and that the only confidence they agreed to observe, and the only trust they agreed to exercise was, upon the payment of their said claim, to refrain from canceling the said securities, and, if required by the said Butler, to indorse them, without recourse, and deliver them as the said Butler should direct.

To the 9th int. he says that the sole consideration for the making,
70 by the said Butler, of the said notes and mortgages was not his indebtednes to the complainant; that the immediate consideration was to secure the indebtedness owing to Isett & Brewster, and to obtain time thereon. An ulterior consideration appeared to be, to have them given on the payment of the said claim of Isett & Brewster, to such other creditor as he should prefer. This respondent says that said Isett & Brewster were bankers at the city of Muscatine; that said Butler having occasion to use large sums of money in the prosecution of his business as a pork-packer, the said Isett & Brewster, in the fall of 1864, agreed to honor the checks of the said Butler on them, he agreeing to give them ample and proper security, satisfactory to them, for any balance or balances they might have against him. The balance they held against him on the 16th of March, 1865, when the said mortgage was made, was $\$11,078.\frac{38}{100}$; that they demanded of the said Butler adequate and proper security for the said balance, and in answer to, and in compliance with such demand, the said Butler delivered to them the said securities. This
71 respondent says he does not know to what the word "notice" in the interrogatory refers, and he has answered the interrogatory as fully as his understanding of it admits.

To the 10th int. he says that about that time the said Butler wrote to the said Isett & Brewster, in which writing he undertook to say that they held the said securities in trust for such creditor as he should designate; that he then designated the complainant as such creditor, and undertook to order the delivery to him of said securities.

To the 11th int. he answers, that the complainant, assuming and pretending the existence of a trust in the said Isett & Brewster of the said securities for his sole benefit, undertook to demand the same of them.

To the 12th int. he says that the said Isett & Brewster, having never assented to, and not recognizing any such trust as the interrogatory assumes, and the complainant undertook to claim, did refuse to deliver up the said securities on the order of the said Butler.

To the 13th int. he says, that said Isett & Brewster never stated or affirmed that they only held the said securities in trust for the
72 real owner thereof, and that the complainant was in equity, the real owner, and solely entitled thereto.

To the 14th int. this respondent, to the first clause, answers that he did not at the time stated, or at any other time, admit and tell the said Butler, that if called npon to testify, or if inquired of as a witness in the suit with Holden, that he would swear, and would have to swear, that the said Isett & Brewster only held said securities in trust for another party, and did not own them in their own right, or under a lien upon them in their own favor; nor did he in any conversation with said Butler use words to which such effect could be given.

To the second clause of said interrogatory he answers that he did not state to the said Higgins that the said Isett & Brewster did not own said notes and mortgage, or any part thereof, or hold the same for their own benefit in any way, but only in trust, and for the benefit of another party, or anything to which that effect could be given; and he says that, on the contrary, he told the said Higgins, substantially, that the said securities were given to Isett &
73 Brewster primarily, to secure them; and on payment of their said claim such disposition was to be made of the said securities as the said Butler should direct.

To the 15th int. He says that the ownership of Isett & Brewster, of the said securities, had never been questioned until the month of December last, but, on the contrary, had, until that time, always been admitted and recognized. There was, therefore, no occasion for them to publish an ownership which no one disputed. He says that they always claimed the said securities as belonging to them, and never pretended or claimed to hold them as trustees of and for the complainant.

And this defendant prays that he may be hence dismissed with his reasonable costs in this cause sustained.

RICHMAN & CARSKADDAN.
WM. F. BRANNAN,
Sol'rs for Def'ts.

74 *S. O. Butler, esq., in ac. with Isett & Brewster.*

Dec.	27	Bal. fr. 1st sheet, 18	332 51
	27		32 50
	28		180 00
	30		2,000 00
Jan'y	2		655 75
	2		149 92
	3		546 50
	7		37 50
Feb'y	1		118 93
	21		2,000 00
Ap'l	3	Protest	325 25
			24,056 86

Jan'y	7	By deposit	10,500 00
Feb'y	2		2,478 48
May	7		2,134 62
	13		2,994 32
		Bal	5,999 44
			24,056 86
May	13.	Bal. due	5,999 44

75 *S. O. Butler, esq., in ac. with Isett & Brewster.*

1864.			
Nov.	1.	To checks	500 00
	8		121 00
	9		100 00
	10		16 10
	11		522 05
	12		866 11
	14		110 40
	15		1,500 00
	16		586 23
	17		4,614 75
	18		164 05
	19		1,803 27
	21		2,841 47
	22		1,078 50
	23		1,000 20
	25		4,344 08
	26		4,654 31
	28		8,575 14
	29		1,998 00
	30		5,775 92
Dec.	1		9,578 06
	2		68 00
	3		9,151 51
	5		7,106 15
	6		12,757 69
	7		423 05
	8		31 74
76	10		5,000 00
	12		100 00
	13		2,138 18
	14		7,358 45
	15		8,000 00
	16		12,840 85
	17		5,641 85
	19		500 00
	20		5,666 67
	21		797 59

	24		1,300 00
	26		2,500 00
			132,231 37
1864.			
Oct.	31.	Bal	216 67
Nov.	15.	By deposit	1,984 56
	19		309 48
	21		2,985 00
	22		5,472 50
	23		720 15
	25		4,975 00
	26		3,980 00
	30		7,760 10
Dec.	1		7,945 55
	2		7,960 00
	3		9,253 50
	6		2,985 00
	7		8,457 50
	8		6,990 00
	9		6,500 00
	12		3,000 00
	13		2,985 00
	14		2,189 00
	15		10,348 00
	16		1,990 00
	17		6,951 00
	19		4,955 85
	26		2,985 00
		Bal	18,332 51
			132,231 37

77 STATE OF IOWA, *Muscatine County:*

I, William C. Brewster, do solemnly swear that I have heard the foregoing answer read, and am acquainted with the contents thereof, and that the matters and things therein stated are true in substance and in fact, to the best of my knowledge and belief, save as to such matters and facts as are therein stated from information and belief, and that as to such I am informed and verily believe the same to be true.

W. C. BREWSTER.

Subscribed and sworn to before me, a notary public in and for said county, this 24 day of April, 1866.

Witness my hand and seal.

[SEAL.] P. JACKSON, *Not'y Public.*

[5-ct. rev. stamp of U. S.]

Which paper is marked "Filed April 24th, 1866.

"W. G. WOODWARD,

"*Clerk C. C. U. S., Iowa.*"

78 And afterwards, to wit, on the 7th day of June, 1866, was filed the following replication·

In the United States Circuit Court, district of Iowa.—May term, A. D. 1866.

The replication of James W. Finley, complainant, to the answer of William C. Brewster, one of the defendants.

This repliant, saving and reserving unto himself all and all manner of advantage and of exception to the manifold insufficiences of the said answer, for replication thereto, saith, that he will aver and prove his said bill to be true, certain, and sufficient in the law, to be answered unto, and that the said answer of the said William C. Brewster is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law, to be replied unto, confessed, and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove, as this honorable court shall direct, and hereby
79 prays, as in and by his said bill he hath already prayed.

JAMES W. FINLEY,
By his Solicitors.
JACOB BUTLER,
ARTHUR W. WINDETT,
Sol'rs for Compl't.

Which paper is endorsed: "Filed June 7th, '66."
W. G. WOODWARD, *Clerk.*

79*a* And on the 2d day of October, 1856, was filed the separate answer of Thomas M. Isett, in the words and figures following, to wit:

In the Circuit Court of the United States for the district of Iowa.

JAMES W. FINLEY
v.
THOMAS M. ISETT, WILLIAM C. BREWSTER, and Sage O. Butler.

The separate answer of Thomas M. Isett, of the city of New York and State of New York, to the bill of complaint against him and others, as defendants, in the said court exhibited.

This defendant now, and at all times hereafter, saving and reserving to himself all and all manner of benefit and advantage to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much or to such parts thereof as he is advised it is material or necessary for him to answer unto, answering, says:

That true it is that he and his co-defendant herein, the said Brewster, were, on the 16th day of March, A. D. 1865, copartners

79*b* in the banking business, at the city of Muscatine, in the State of Iowa; but he says that said partnership ceased on the 16th day of May following, and then became, and has been since that time, dissolved. He admits that the said Sage O. Butler, a defendant herein, on or about the 16th day of March 1865, made his five certain promissory notes of that date, for the sum of two thousand dollars each, payable to the order of the said Isett & Brewster, in one, two, three, four, and five years respectively, with six per cent. interest; and that for the purpose of securing said notes, he executed a mortgage on certain real estate in said city, known as "Butler's pork-house property," but this defendant denies that the said securities were given to, or accepted by, the said Isett & Brewster, on the agreement or understanding that they were to hold the same in trust for the complainant, or that the said securities were to be assigned when, and as, the said Butler should direct.

And this defendant says that the said Butler was, in the fall of the year 1864 and winter of 1864–5, largely engaged in the purchase of hogs and packing of pork; that to enable the said Butler to prose-

79*c* cute and carry on his said business, the said Isett & Butler, to prosecute and carry on his said business, the said Isett & Brewster had made large advances of money to him; and that on the said 16th day of March, 1865, the said Butler was indebted to them, for and on account of such advances, in the sum of eleven thousand and seventy-five and 13-100 ($11,075 13) dollars, without computing any interest on said advances; and he says that the said securities were given to and taken by the said firm of Isett & Brewster, for their own use and benefit, and in consideration of and to secure in part the indebtedness then by the said Butler owing to them, and that the only understanding or agreement between the said Isett & Brewster and the said Butler touching said securities, and the purpose for which the same were made and delivered, and the uses to which they were to be applied, was this: that the said Isett & Brewster were to hold the said securities as security in part for the indebtedness of said Butler to them; that they were not to enforce them until other securities, which they then held, of said Butler were exhausted or should prove unavailing and valueless; that if the said

79*d* Butler should pay up said indebtedness to them, they were not to cancel said securities, but to hold them for such person as said Butler should name, and to deliver them over to such person without recourse, when required by the said Butler so to do; or if the indebtedness to them of the said Butler were paid by any creditor of said Butler, with his approval, then to assign without recourse said securities to such creditor. This defendant says that this was the full extent and quality of any trust or confidence reposed in, or mentioned to, or accepted by, the said Isett & Brewster, in so far as the said securities were concerned; and that said trust, if trust it can be called, was contingent and dependent on the said indebtedness to them being paid; and that until such payment such trust cannot arise in favor of, nor, as this defendant is advised, be enforced by, any creditor of said Butler. And he further says that said Isett & Brew-

ster would not have accepted said securities without their being the beneficiaries thereof in fact as well as in manner; that they did not consent, nor would they have consented, to receive, hold, and transfer said securities for the benefit of others, to the exclusion of their own interests as creditors of said Butler.

Further answering, this defendant says that the first knowledge of any kind or from any source that he had of the alleged letter
79*e* of the said Butler to the complainant, purporting to be dated April 24, 1865, and incorporated in the complainant's said bill, was in the month of December, 1865, when the said Butler, by a letter written at Chicago, undertook to demand the delivery of said securities to the complainant; and he denies that either he or the said firm of Isett & Brewster ever approved of or assented to the statements in said alleged letter of April 24th contained, or that he or the said firm knew of the existence of any such letter, if the same was in fact written and forwarded, as alleged, anterior to the month of December, 1865; and he further says that had such letter been submitted to the said firm, or either member thereof, before the same was sent, they would at once have protested against it.

Further answering, this defendant says that until the month of December, 1865, when the said Butler undertook and assumed to pronounce the possession of the said securities a mere naked trust on the part of said Isett & Brewster, and at the same time undertook and assumed to nominate the said complainant as the beneficiary of said pretended trust, the right to, and beneficial interest in, the
79*f* said securities of the said Isett & Brewster was never disputed, or even questioned, by the said Butler or the said complainant. On the contrary, he says such right and beneficial interest was in a variety of ways, and at a number of times, distinctly recognized and admitted by both the complainant and the said Butler, before said month of December, 1865; and he says that the said Isett & Brewster have always claimed, from the time the said securities were executed up to the present, to be entitled to and beneficially interested in said securities, to the amonnt of their claim against said Butler.

He further says that, regarding the agreement with the said Butler, in respect to the disposition to be made of said securities, when the claim of Isett & Brewster, as amounting in honor, if not in law, to a trust, the said firm have, in general terms, spoken of their connection with said securities as being coupled with a trust; but he says that when the nature, extent, and quality of the trust or confidence has been inquired into by any one having the right to make such inquiry, they have disclosed the same fully as herein stated, and not otherwise.

Further answering, this defendant says that said Isett &
79*g* Brewster have fully exhausted all the securities lodged (?) with them by the said Butler, except those which are the subject of this suit; that after a full and just allowance to the said Butler, of all the proceeds arising from said securities, there is still due and owing to them by the said Butler the sum of $5,999 40-100, with interest

from May 13, 1865; and that for the payment of the said sum, with interest as aforesaid, the said notes and mortgage are held as security.

Further answering, this defendant says that he knows nothing of any promises or agreement to or with the said complainant by the said Butler, to secure said complainant, by a mortgage on the pork-house property of said Butler; that if the said Butler made any such promise to the said complainant, such promise was not communicated to this defendant or the said firm until long after the said securities had been delivered to the said Isett & Brewster, for the purpose and with the understanding hereinbefore stated.

This defendant, further answering, says that as to the alleged conversations had by his co-defendant, Brewster, with the said
79*h* Butler and one Levi Higgins, as the same are set forth in the said complainant's bill, he was not present at any of them, and knows nothing respecting them, and can neither admit nor deny the same, though, from all the information he has been able to obtain, he charges that no such conversations as in said bill contained actually took place between the said Brewster and the said Butler, and the said Butler and the said Higgins.

Further answering, this defendant denies all and singular the charges of fraud, confederation, and conspiracy in the said bill contained, touching the possession and use, by the said Isett & Brewster, of the said securities, and avers that if there is any fraud, or conspiracy, or confederation, the same originated with, and is now sought to be practised, by the said complainant and the said Butler, in their efforts to change the character of the said securities, and to appropriate them to uses and purposes wholly at variance with the uses and purposes for which they were delivered to the said Isett and Brewster, and were accepted, and are now held by them. and thus to deprive the said Isett & Brewster of their beneficial interest in said securities; and which interest this defendant
79*i* says was the inducement and consideration for the making and accepting them.

This defendant further says, that to so much of said bill as charges that they, the said Isett & Brewster, pretend that they hold and own a prior mortgage and debt on the real estate, covered by the mortgage which is the subject of this suit, this said defendant, Butler, brought to them certain notes, payable to and indorsed without recourse by one Thomas Webster, for the sum of about $7,000; also a mortgage on said pork-house property, to secure said mortgage, which he, the said Butler, desired them to take, as additional security; but that the said Isett & Brewster being doubtful of the validity of said Webster notes and mortgage, and believing that the same had been paid or otherwise discharged, and of no value, declined to receive them as such security; and that thereupon, the said Butler had prepared and delivered to them the notes and mortgage now in suit, meaning and intending thereby that the same should be taken and held by the said Isett & Brewster as security for their said claim against the said Butler.

He admits that the said Isett & Brewster refused to deliver the said securities to the said complainant, in December, 1865,
79*j* when the said complainant made or attempted to make a demand therefor, and he says that the said complainant, when he made such demand, well knew the right to and interest in said securities, possessed by the said Isett & Brewster, and the purposes for which they held the same.

Thereupon he says that the said complainant's bill is wholly without equity, and ought to be dismissed.

And in answer to the interrogatories contained in complainant's said bill, this respondent say, to the—

First interrogatory. He knows nothing whatever of any indebtedness in the month of March, 1866, [1865?] on the part of said Butler to said complainant.

To the second interrogatory he says he knows nothing of any promises by said Butler to give complainant a mortgage on his pork-house property.

To the third interrogatory, he says the notes and mortgage were executed and delivered to Isett & Brewster as security for their claim against said Butler, and were so accepted, and are now so held by them, the said Butler reserving the right to control the dis-
79*k* position of them, when the said claim of Isett & Brewster paid.

To the fourth interrogatory he answers no.

To the fifth int. he says he knows nothing whatever of the writing and sending of the alleged letter of April 24th, 1865, or whether any such letter was in fact written before the 9th of Dec'r, 1865.

To the sixth int. he answers no.

To the seventh int. he answers they knew nothing of such alleged letter prior to said 9th day of Dec'r, nor what indebtedness, if any, was owing by said Butler to complainant, or what promises, if any, said Butler had made to complainant to give him security.

To the eight interrogatory he says that said notes and mortgage were given to Isett & Brewster, to secure their claim against said Butler, and to that end were made directly to them; that the only confidence asked or given respecting them was, that on the payment of their said claim by the said Butler, they, the said Isett & Brewster, would indorse, without recourse, and deliver the said securities as the said Butler should require; or if the same were paid by any
79*l* other creditor of said Butler, with his approval, then to so assign them to such creditor.

To the ninth interrogatory he says that the sole consideration for making said notes and mortgage was not the indebtedness of the said Butler to the complainant; that the consideration for making the said notes and mortgage to the said Isett & Brewster was the indebtedness of the said Butler to them, growing out of advances of money before that time, made to the said Butler by the said Isett & Brewster at his request and for his accommodation. This defendant, in answer to this interrogatory touching the circumstances under which these securities were made, can only say that at the time the said Butler was

largely indebted to the said Isett & Brewster; that such indebtedness was $11,075 13-100; that pork products prepared for market by the said Butler were rapidly declining, and said Butler, in view of this condition of prices, proposed as security for their said claim, with other things, a mortgage on his said pork-house property. The other securities were some empty tearces [tierces?], some lard, and a lien on seven hundred barrels of pork, on which there was a prior claim of some
79*m* $17,500 in favor of H. M. Holden; that, in pursuance of his agreement and promise to give them a mortgage on his pork-house property, he tendered a mortgage and those notes, executed in 1857 by the said Butler to one Thomas Webster, for some $7,000; that on their declining to receive these last as security, he shortly after placed in their hands the securities now in suit, as additional security to them. This respondent says that he has already stated the uses and purposes for which the said securities were and are held by the said Isett & Brewster.

To the tenth int'y he says that about the 12th of December, 1865, the said Butler pretended and assumed to create a trust in favor of the complainant, and assumed to direct the said Isett & Brewster to deliver the said securities to the complainant.

To the eleven int'y. He says that the said complainant, pretending the existence of a trust in his favor, undertook to demand performance of such pretended trust.

To the twelfth int. he says that as they had never known of or recognized any such trust as the complainant assumed; they declined
79*n* to comply with the order of said Butler to deliver the said securities to the complainant.

To the thirteenth int'y he says that said Isett & Brewster have always regarded the said securities as having connected with them a moral trust, as he has already stated, and they have always spoken of them as being a trust matter; but he says that they have never stated or believed that the complainant was, in equity, entitled to them.

To the fourteenth int'y he answers that he knows nothing of the conversations therein alleged.

To the fifteenth int'y he says that the said Isett & Brewster have always claimed, as well before the month of October, 1865, as during and since the said month, to be the owners of said securities, in their own right, and have never claimed to hold them solely as trustees for the complainant.

And this defendant, having answered the matters and things in said bill of complaint charged, prays to be hence dismissed with his costs.

WM. F. BRANNAN,
RICHMOND & CASSKADDAM,
Sol'rs for Def't.

79*o* THE STATE OF NEW YORK,
County of New York:

Thomas M. Isett, being first duly sworn, maketh oath and saith, that he has read the foregoing answer, and knows the contents thereof, and that the matters and things therein stated are true in substance

and in fact, as therein stated, to the best of his knowledge and belief, save such matters and facts as are therein stated from information and belief, and that as to such matters he is informed, and verily believes, the same to be true.

THOMAS M. ISETT.

Subscribed and sworn to before me this 27th day of September, 1866.

[SEAL.] FRED'K HESS,
Notary Public in and for the City and County of New York.

79*p* UNITED STATES OF AMERICA,
District of Iowa:

I, W. G. Woodward, clerk of the Circuit Court of the United States, in the district of Iowa, do hereby certify that the foregoing pages of writing, numbered from 1 to 79o, inclusive, constitute and are a full, true, and complete transcript of the bill, answers, replication, and all pleadings in the cause of James W. Finley *vs.* Isett, Brewster, and Butler, lately pending in the said Circuit Court, and now appealed to the Supreme Court of the United States, as fully as the same remain of record in my office.

And the appeal bond, given on the said appeal, and approved by me, as ordered in the final decree, is also hereto attached.

In testimoney whereof, I hereto set my hand and affix the seal of the said Circuit Court, this 16th day of Sept., A. D. 1867.

[SEAL.] W. G. WOODWARD, *Clerk.*

79*q* Supreme Court of the the United States.

Appeal bond.

JAMES W. FINLEY
vs.
THOMAS M. ISETT, WILLIAM C. BREWSTER, and SAGE O. Butler.

Know all men by these presents, that we, James M. Finley, R. M. Burnett, and Audley G. Butler, are held and firmly bound unto the above-named Thomas M. Isett, William C. Brewster, and Sage O. Butler, in the sum of five hundred dollars, to be paid to said Isett & Brewster and Butler, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, firmly by these presents.

Sealed with our seals, and dated May 29th, 1867.

The condition of the above obligation is such, that whereas said Finley has appealed to the Supreme Court of the United States, from the order and decree entered by the Circuit Court of the United States for the district of Iowa, in the above-entitled suit. Now, if the above-named Finley shall prosecute his said appeal to effect, and answer all damages and costs, if he shall fail to make good his plea,

then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

[SEAL.] JAS. W. FINLEY.
[SEAL.] R. M. BURNETT.
[SEAL.] A. G. BUTLER.

The foregoing bond is hereby approved by me, under the order of the court, authorizing the clerk to approve the same.

[SEAL.] W. G. WOODWARD,
Clerk C. C. U. S. Iowa.

Endorsed: No. 63, eq. James W. Finley *vs.* Thomas M. Isett, William C. Brewster, and Sage O. Butler. Appeal bond. Filed June 6, 1867. W. G. Woodward, clerk. Approved by me this 6th June, 1867. W. G. Woodward, clerk.

80 *Deposition of Levi Higgins, on the part of the complainant.*

UNITED STATES OF AMERICA,
Northern district of Illinois:

Be it remembered, that on the eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, I, J. Tilden Moulton, a commissioner, duly appointed by the Circuit Court of the United States for the northern district of Illinois, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed Feb. 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, did cause personally to appear before me, at my office, in the city of Chicago, in said northern district of Illinois, Levi Higgins and William H. Rogers, to testify, on the part of the complainant, in a certain cause
81 depending in the Circuit Court of the United States for the northern district of Iowa, at Des Moines, wherein James W. Finley is complainant, and Sage O. Butler, Thomas M. Isett, and William C. Brewster are respondants.

And the said Levi Higgins was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid. I carefully examined the said Levi Higgins, and he did thereupon depose and say as follows, to wit:

1st interrogatory. What is your name, age, occupation, and place of residence?

Answer. Levi Higgins; age, thirty-nine years; residence, Chicago, Illinois; commission merchant.

2d int. Do you know the parties to this suit, or any of them? If so, state how long you have known them.

Answer. I know the parties. I have know Mr. Butler some three years; the other parties about 18 months, I suppose.

3d int. Please state whether you ever had any conversation with Mr. William C. Brewster, one of the defendants, relative to a certain mortgage and notes for $10,000, from Sage O. Butler to
82 Messrs. Isett & Brewster, of Muscatine, Iowa? If you answer yes, go on and state when and where such conversation or conversations occurred, and what was said by Mr. Brewster upon that subject, giving the whole conversation.

Answer. I had a conversation with Mr. Brewster on that subject; it was in his banking house, Muscatine, Iowa; it was about the 18th of April, 1865. I learned of their being such a mortgage on record. I went to Mr. Brewster, and reminded him of a former conversation with me, in which he stated that Mr. Butler did not owe Isett & Brewster; was not indebted to them, and asked him why he took this mortgage —on what account or ground. He stated that he did not take it on his own account, but in trust for another party. That is all the conversation we had, that I recollect. We had a considerable conversation about other matters, but that is all I recollect. I am particularly interested in that matter; that impressed it on my mind.

4th int. Please describe the mortgage that you referrod to in your conversation with Mr. Brewster, and what it was upon.

Answer. It was a mortgage for $10,000, upon Mr. Butler's pork-house, in Muscatine.

5th int. Was anything said by Mr. Brewster as to how Isett
83 & Brewster came to receive that mortgage? If anything, state as near as you can recollect.

Answer. The statement that I have given is all that was said about it. I asked no further questions.

Cross-examined.

By Mr. Brannan:

1st cr. int. Are you in any manner interested in the present suit, in the plaintiff's behalf?

Answer. Not to my knowledge.

2d cr. int. You have stated, Mr. Higgins, in your examination in chief, that the conversation you have stated respecting this mortgage is the only conversation you had with Mr. Brewster on this subject. Had you any conversation in October last with him, on this matter?

Answer. It is likely I had a conversation with him about that time. I had a conversation with him last fall, and it is likely it might be in October in relation to this mortgage.

3d. cr. int. Did you not, at that time, offer Mr. Brewster $5,000 for an assignment of the notes and mortgage to you?

(Objection, because it is not, in substance, a proper subject of cross-examination on the examination in chief.)

84 Answer. I did not.

4th cr. int. Did you not offer to buy the notes and mortgage of Mr. Brewster at that time?

(Objection, because it is new matter, not arising from the examination in chief, and because Mr. Higgins's acts and offers are not competent evidence for defendant.)

Answer. I have no recollection of making any offer to buy them.

5th cr. int. Can you state what conversation you had respecting this mortgage, and the notes, and their disposition with Mr. Brewster, if any?

(Objection on the same ground as above, and also because defendants cannot introduce their own declarations in evidence; objection withdrawn.)

Answer. Mr. Brewster, at that time, claimed to hold this mortgage as security for $6,000 against S. O. Butler, and offered it to us, with other securities, a compromise* for a claim we had against S. O. Butler, provided we would pay him $6,000. Mr. Butler was present at the time.

*This is so written that I do not clearly understand it, but I have written it in the best sense I can make.

W. G. WOODWARD, *Clerk.*

Re-examined.

6th int. Was Mr. Finley present at the conversation you speak of, in October?

85 Answer. No, sir; he was not present.

7th int. Did you decline or accept Mr. Brewster's offer you speak of?

Answer. I declined it.

8th int. State whether or not you declined it on the ground that Mr. Brewster had no right to make such disposition of said securities to you, after having informed you, as you have testified, that he and his partner had received and held them in trust for and on account of another party than themselves.

(Objection, as not only being leading, but irrelevant and immaterial.)

Answer. That was one reason why we declined. There were two or three other reasons. The other securities were worthless, and we didn't want to buy a law suit and pay $6,000 for it; for we knew that Finley claimed the mortgage at that time, and we didn't want to buy a law suit with him.

Re-cross-examination.

6th cr. int. Where did this conversation occur, and when, as near as you can fix the time? Also, was it before or after an interview between complainant, Mr. Finley, and Mr. Brewster, at Muscatine?

Answer. The conversation was at the Ogilvie House, in Muscatine.

I can't fix the date; I think it was in October; I am not

86 positive. I don't recollect of hearing Mr. Finley speak of it, but I learned that he had been at Muscatine a short time before; that is my recollection.

Re-direct examination.

9th int. From whom did you learn that Mr. Finley had been there shortly before?

Answer. I think I heard it from Mr. Butler and Mr. Brewster in conversation. I am not positive of that; I think that Mr. Finley told me.

LEVI HIGGINS.

Subscribed July 18, 1865.

J. T. MOULTON, *U. S. Com'r.*

87 And William A. Rogers was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the said cause, and did thereupon, on examination, depose, testify, and say:

1st int. What is your name, age, occupation, and residence?

Answer. William H. Rogers; thirty-nine years; am in the elevator business; reside in Chicago.

2d int. Do you know the parties to this suit? If so, how long have you known them?

Answer. I have known Mr. Finley from seven to ten years; have been with him six years. Mr. Isett I was introduced to in Muscatine some four years ago; Mr. Brewster at the same time. Mr. Butler I have known some six years.

3d int. State whether or not Sage O. Butler was indebted to Mr. Finley in March, 1865, in any amount of money. If so, state the extent of such indebtedness.

Answer. He was; twenty-five thousand dollars and upwards.

4th int. State how such indebtedness arose, and your means of knowledge of the fact.

88 Answer. The indebtedness arose from cash advances, in the general character of shipments, and advance. I have kept the accounts of Mr. Finley for the last six years.

5th int. State whether any portion of that indebtedness has been paid.

Answer. It has not.

6th int. State what you know, if anything, of any demand being made by Mr. Finley on Mr. Butler, in the early part of March, 1865, for security; when such demand was made, if any; what security was required, or proposed to be given; and state whether Butler made any agreement as to giving such security, and the nature and extent of such agreement, if any was made. State your means of knowledge of the above.

(Objection by the def't, Brewster, for the reason that he cannot be affected by correspondence and agreements in transactions between the complainant and Butler.)

Answer. I made the demand myself for Mr. Finley, at Muscatine, on the afternoon of the fourth of March, 1865, on Mr. Butler, at his pork-house, in Muscatine. I found Mr. Butler's pork product, that he had on hand at that time, was held by other parties, and

89 he could not give me any further security on it, at that time. He also said to me that he did not owe one dollar in Muscatine. He would see, in a short time, if he could give anything from his pork product then on hand; if not, he held himself bound in honor to protect Mr. Finley; he would make a mortgage of his pork-house property, to secure him to that extent—the value of the pork-house and ground. That was all the conversation I had with him; it was then time to get into the train and come off.

7th int. State, if you know, the estimated market value of the property you speak of, at that time.

Answer. I should think it was worth $15,000—a fair cash valuation of it, as I saw it then. I had seen it several times.

8th int. State whether, at any time, the complainant was informed by said Butler what, if anything, had been done by him toward performance of his promise to give security for said claim. State when and how such information, if given, was conveyed.

Objected to by defendant, Brewster, on the ground that he cannot be affected by transactions between compl't and Butler, to which he is no party, and that he cannot be affected by the declarations of Butler.)

90 Answer. It was made by the letter of defendant, Butler, to comp't, Finley, of the twenty-fourth of April, 1865; which letter I now produce, in Mr. Butler's handwriting, and marked by the commissioner "Exhibit A," to be by him attached to this my deposition. I know it to be in Mr. Butler's handwriting; have seen him write; have seen him sign his name.

9th int. Do you know whether Sage O. Butler, the defendant, ever made or gave any order or direction to Messrs. Isett & Brewster, touching the transfer and delivery of the mortgage and notes which are the subject of this controversy? If you answer yea, state how and when said order was made, by whom, and your means of knowledge.

Answer. There was such an order made, on the ninth of December, 1865, by an order of Mr. Butler's, which is here produced, and marked by the commissioner "Exhibit B," and by him to be attached to this my deposition. I wrote the order, and Mr. Butler signed it, at the office of James W. Finley, in Chicago, on the afternoon of Saturday, December ninth, 1865. That part of the order in brackets was put in at the request of Mr. Sage O. Butler. He told me that Mr. Wm. C. Brewster had read his letter to James Finley, of April 24, 1865—"Exhibit A"—before writing the letter to said Fin-

91 ley, and for that reason he wished that part of the order in brackets to be inserted.

The further examination is postponed to to-morrow morning, at nine of the clock.

J. T. MOULTON,
U. S. Com'r.

THURSDAY, *July* 19, 1867.

Resumed the examination, pursuant to adjournment:

10th int. Please state what, if any, conversation, between Sage O. Butler and complainant, occurred during the summer or fall of 1865, and when and where it took place. Please state the whole of any such conversation, as nearly as you can.

(Objected to by defendant, Brewster, on the ground that he can be affected by no conversations between other parties, when he was not present or authorized them.)

Answer. A conversation in December, in the office of Mr. Finley, took place in my presence. The substance of it was in regard to this mortgage and notes, which Mr. Butler stated was held by Isett & Brewster, in trust for James W. Finley. The letter of April 24th covers most of the conversation. He reiterated the facts of
92 the case. He also said, on his return home to Muscatine, he would see Mr. Wm. C. Brewster; present the order of December 9th to him; have the securities given up to James W. Finley, according to his agreement in March, 1865. I also had a conversation, myself, with Mr. Butler, at the Tremont House, in Chicago, on the afternoon of December 10th, 1865. Mr. Butler said to me, at that time, that the expressed understanding, when the mortgage and notes were given, that they were given to Messrs. Isett & Brewster, in trust for James W. Finley, of Chicago, and that Mr. Brewster received them with that understanding. At the time he gave them to Mr. Brewster, he was not aware that he was indebted to them one dollar, and if he was, they held other securities to cover any indebtedness.

11th int. State whether, at any of the conversations, anything was said by Mr. Brewster about the contents of the letter of April 24th, 1865, being made known to Isett & Brewster. If anything was said by Butler on that subject, give the full particulars of such statement, to the best of your recollection.

(Objected to, as in the last preceding question, and as leading hearsay.)

Answer. Mr. Butler told me that the letter of April 24, 1865,
93 was read by Mr. Brewster at the time of writing it. He made no objection to the letter, and seemed to fully understand for what purposes he received the mortgage and notes from Butler.

12th int. Please state the reason of the insertion of the words in brackets in the order of December 9, 1865.

(Objected to, as the preceding questions.)

Answer. It was inserted at the request of Mr. Butler, who stated at the time to myself and Mr. Finley both absolute facts of the case.

13th int. Please state what connection you yourself had with the business between Mr. Finley and Mr. Butler, on the part of Mr. Finley, in 1865.

(Objected to on the part of def't, Brewster, as immaterial and irrelevant, so far as he is concerned.)

Answer. I have been keeping Mr. Finley's books for the last six

years; that is the only connection there is of it. I am cognizant of all the facts in this case.

14th int. State when the letter of Butler, dated April 24, 1865, was received by the complainant, James W. Finley.

(Objected to, as in the last preceding question.)

Answer. Received in due course of mail; I should say in forty-eight hours after being written.

94 15th int. Please state whether compl't objected to said letter, or the acts of Butler as therein disclosed, or not. State what was his conduct, in view of that letter, upon receipt thereof, and the communicatien of facts therein contained.

(Objected to as secondary evidence, and the complainant cannot give his own declarations and acts in his own favor as against def't, Brewster.)

Answer. In a conversation between Mr. Finley and myself, on the receipt of the letter, he did not object. He said to me that he considered the security just as safe with Isett & Brewster as in his own desk. He acquiesced in it.

16th int. Do you know of the letter of April 24th, 1865, being lost or overlooked for some time by the compl't? If so, give the time of such occurrence and your means of knowledge.

(Objected to as immaterial and irrelevant, so far as def't Brewster is concerned.)

Answer. I don't know of its being lost, for it has been in my possession ever since it was received, up to the commencement of this suit. In the month of October I was east, and Mr. Finley couldn't get at it—couldn't get sight of it—it being locked up

95 with my papers in my private drawer. On my return from the east, my attention was called to some correspondence between Mr. Finley and Wm. C. Brewster, between the 19th of Oct. and 1st of Nov.—I then—I got home on the fifth of November; showed Mr. Finley this letter of Ap'l 24th, which had been lost sight of during my absence.

WM. H. ROGERS.

Subscribed July 19, 1866.

J. T. MOULTON, *U. S. Com'r.*

Deposition of Jas. W. Finley, complainant.

And the complainant was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth in the said cause, and did thereupon, upon examination, depose, testify, and say:

1st interrogatory. What is your name, age, occupation, and residence?

Answer. James W. Finley; fifty-nine years of age; commission merchant in Chicago, and complainant in this cause.

2d int. How long have you been acquainted with the respondents?

Answer. I have known Mr. Brewster personally from May,

96 1865. I have known Butler twelve years and more. Mr. Isett I met once at his banking office in Muscatine.

3d int. State whether S. O. Butler was indebted to you in March, 1865; and if so, in what amount.

Answer. He was; over $23,000 00.

4th int. State if any part of that debt has been since paid.

Answer. No part has been paid.

5th int. State what, if any, agreement or understanding there was between you and Butler in March, 1865, and prior to that time, about securing your claim.

(Objected to on the ground that any agreement or understanding between Butler and Finley cannot affect the defendant, Brewster.)

Answer. He promised me a mortgage on his pork-house, to secure it.

6th int. Please state whether any mortgage on that pork-house was at any time made by said Butler for your benefit; and if so, when and under what circumstances.

(Objected to on the same ground as the preceding, and because it inquires about a writing which cannot be proved orally.)

Answer. There was. It was made, I think, in March, 1865, to Isett & Brewster, in trust for my benefit.

97 7th int. When and how were you informed of the fact?

Answer. By letter of April 24, 1865, from S. O. Butler, and referred to in the deposition of Mr. Rogers, and marked "Exhibit A." I suppose it was received here on 25th of April, 25th or 26th.

8th int. Please state what your action was on the receipt of that letter, touching the transactions and securities therein referred to.

(Objected to on the same ground of the previous objections, and this additional one, that the compl't cannot give his own acts and conduct as evidence against def't, Brewster.)

Answer. I rested. I accepted Mr. Butler's offer, and rested satisfied, as far as the mortgage was.

9th int. State if you had any conversation with Mr. Brewster, in or about May, 1865, touching his claim, or touching the claim of Isett & Brewster against Mr. Butler. State what was said by Mr. Brewster, if anything, in relation to Mr. Butler's affairs with yourself.

Answer. I had a conversation with Mr. Brewster. I think it was in May, in my office. Mr. Brewster then stated to me the debt of Isett & Brewster against S. O. Butler was of small amount.

98 He said it would not be in the way of my settling my claim with Butler, and he thought in a short time that they would be able—I suppose he meant he and Mr. Butler—that they would be able to come over and settle all claims, and they wouldn't do it with mortgages; that they would be able to do it with money.

10th int. What, if anything, was said by Mr. Brewster in relation to mortgages referred to in your last answer? What mortgage did he speak of?

Answer. There was nothing said about the mortgage that I recol-

lect; only the remark Mr. Brewster made, that they wouldn't bring mortgages, but bring money to settle the claims.

11th int. State if you had any conversation with Sage O. Butler, in the summer of 1865, in Chicago, in relation to the mortgage and notes for $10,000, made by him, and in the hands of Isett & Brewster, and what, if anything, was said by Butler on that subject.

(Objected to on the ground that Butler's declarations or statements cannot affect Brewster when he was not present.)

Answer. I had a conversation with Butler at the Tremont House, in Chicago, in August, 1865, I think. It was after his return from St. Paul; and he then stated to me, on his return home, that
99 he would send me the mortgage and notes held by Messrs. Isett & Brewster.

12th int. State whether or not any demand or request was ever made by you on Messrs. Isett & Brewster for the securities in question in this suit; when and where was such demand made. And state whether it was complied with or not.

Answer. I made a demand for them in December, 1865, and they refused to comply with it. It was in their former banking house in Muscatine.

13th int. In the conversation you had with Butler in August, above referred to, state what claim you made to said mortgage and notes, if any?

(Objected to on the ground that compl't cannot give in evidence his own declarations, made to Butler in his own favor.)

Answer. I claimed them on his indebtedness to me.

14th int. Was that claim questioned or disputed by Butler in any way?

(Objected to for the reason that Mr. Butler's statements, or declarations, or conduct, or those of pl't'ff, cannot affect the def't, Brewster, when not a party to them.)

Answer. It was not.

100 15th int. On what ground was it made?

(Objected to for the reasons before given in previous questions.)

Answer. On the ground that Mr. Butler had placed those securities in their hands for my benefit.

16th int. State whether, during the period of time of the interviews and correspondence between yourself and Mr. Brewster, and Mr. Butler, which occurred during the month of October last, the letter of Butler to yourself, dated April 24, 1865, was lost to you or overlooked.

Answer. That letter of Butler's was placed in private papers in the safe by Mr. Rogers, and he was absent from the city at the time of the correspondence. I had lost sight of the letter.

17th int. Please state why, at the interview between yourself and Mr. Brewster, and Mr. Butler, at Muscatine, in October last, referred to in that correspondence, you did not claim said mortgage and notes, under the letter of April 24th, 1865.

Answer. One reason, I supposed that Mr. Butler and Mr. Brew-

ster both understood the matter; another one is, that I had lost sight of this letter.

101 18th int. Please state what security from Butler was the object of your endeavors and conversation with the parties named, at the time referred to?

Answer. My object was to get additional securities.

19th int. What additional securities?

Answer. Additional security on the pork-house and the Holden bank claim.

20th int. State whether that object was one made known by you to Messrs. Brewster and Butler at the time.

Answer. It was.

21st int. Have you ever parted with, waived, or conveyed to any one your right or claim of right to the benefit of the mortgage securities in question?

Answer. No.

22d int. Was it ever intended by you, in your correspondence and interviews with Mr. Brewster, occurring in the month of October last, to give up or renounce the benefit of said securities, or the trust respecting them, claimed under your agreement with Butler and his letter of April 24th, 1865?

(Objected to for the reason that the correspondence is in writing, and explains itself; and that the language employed in the interviews is the only test to determine its meaning.)

Answer. It was not.

102 *Cross-examined.*

By Mr. Brannan:

1st cr. int. You state that Butler promised you a mortgage on his pork-house to secure your claim. State when, and to whom such alleged promise was made.

Answer. He promised me in Muscatine, and he promised me in Chicago. He made it to me, and he made it to Rogers, as he told me. I cannot fix the dates. It was before Rogers was over there in March.

2d. cr. int. You say you had conversation with Mr. Brewster in your office in Chicago, in the month of May, 1865, respecting your claim against Butler. Can you state who came with Mr. Brewster to your office? also, the full details of that conversation?

Answer. Anderson Chambers, of Muscatine, came with him. I couldn't state the details of that conversation, for I don't recollect it. We were not together more than ten minutes.

3d cr. int. Was the only authority you had for claiming these securities contained in the letter of Butler to you, of April 24th, 1865?

Answer. Yes; that was the first knowledge I had of the securities being given. He had promised it to me before.

4th cr. int. State, if you can, how long you were at Mus-
103 catine in the month of October, 1865, and when you returned to Chicago.

Answer. I was in Muscatine two days, and returned on the nineteenth. I think I returned in the morning; and Mr. Rogers left for New York in the evening of the same day.

5th cr. int. You say that in your interviews with Butler and Brewster, at Muscatine, when you were there in October, 1865, you did not claim said mortgage and notes, under Butler's letter of April 24th preceding. Did you, in your conversation with Mr. Brewster at that time, refer at all to said letter?

Answer. I did not.

6th cr. int. What reason did you give to Mr. Brewster, in your conversation with him in December last, when you demanded these securities, why you did not, in the October interview, speak of Butler's letter to you of April 24th?

Answer. My reply, if I recollect right, was that Butler requested it to be confidential.

J. W. FINLEY.

Subscribed July 19, 1866.

J. T. MOULTON, *U. S. Com'r.*

104 *Exhibit A.—J. T. Moulton.*

MUSCATINE, *April* 24, '65.

James W. Finley, Esq., Chicago.

DEAR SIR: I telegraphed you Saturday that I would "meet you at Tremont House, 10 o'clock." I was two minutes too late for the cars Saturday, which prevented my being there, and I cannot leave home just now. I have now, unsold, in your hands, and H. D. & Co's, over $100,000 worth of pork products, and until I know how I am coming out on it, cannot make propositions that would be satisfactory to you or to myself; but for the purpose of protecting you to some extent against hostile creditors, I executed my notes on the 16th March, at one, two, three, four, and five years, with interest at 6 per ct., to order of Messrs. Isett & Brewster, and secured the same by mortgage on my pork-house, and the mortgage was recorded. Messrs. I. & B. hold these notes in trust, and will at proper time transfer them with mortgage, (without recourse,) to parties I may designate.

When I know my real situation, I hope to do more; but in
105 meantime, please keep the above as confidential.

Truly, your friend,

S. O. BUTLER.

Exhibit B.—J. T. Moulton, U. S. Com'r.

Messrs. Isett & Brewster.

GENTS: Having, on the 16th day of March last, placed in your hands certain securities, to be held in trust for such of my creditors as I might afterwards designate, (for the description of said securities see my letter of April 24th, 1865, to James W. Finley, of Chicago, Ill's, annexed to this, which was submitted to you for your approval,

before mailing,) and then to be delivered by you to them, I now designate Mr. Jas. W. Finley, of Chicago, as the person to receive said securities from you, and you will, therefore, in execution of said trust, please deliver the same to Mr. Jas. W. Finley, or his agent.

Yours, resp'y,

S. O. BUTLER.

Chicago, Dec. 9, 1865.

106 Attached to the foregoing papers was the following:

In the Circuit Court of the United States for the district of Iowa.

J. W. FINLEY
v.
SAGE O. BUTLER, THOMAS M. ISETT, and WILLIAM C. BREWSTER.

The depositions of Levi Higgins, James M. Finley, and W. H. Rogers, were taken by J. T. Moulton, esq., United States commissioner for the northern district of Illinois, and master in chancery of the eighth judicial circuit of the United States, under an agreement between the plaintiff and W. C. Brewster; and we hereby waive all objections to errors or informalities in the certificate thereto, want of notice.

Chicago, July 19, 1866.

ARTHUR W. WINDETT,
Sol'r for Compl't.
WM. F. BRANNAN,
Sol'r for W. C. Brewster.

107 UNITED STATES OF AMERICA,
Northern district of Illinois:

I, J. Tilden Moulton, a commissioner, duly appointed by the Circuit Court of the United States for the northern district of Illinois, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States," passed February 12th, 1812, and the act of Congress, entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, that the witnesses above-named are material and necessary in the cause in the caption of the said deposition named, and that they reside out of the district and more than one hundred miles from the place where the trial of the said cause is appointed to be held. I further certify that no notification
108 of the time and place of taking the said deposition, signed by me, was made out and served on the adverse party, to be

present at the taking of the deposition, and to put interrogatories, if he or they might think fit, but furnished me with the stipulations hereunto attached, signed by A. W. Windett and Wm. F. Brannan, as solicitors for the parties named, in connection with their respective signatures.

I further certify that on the eighteenth day of July, in the year of our Lord one thousand eight hundred and sixty-six, I was attended by Mr. Windett, as solicitor for complainant, by William C. Brewster, one of the respondents, and his solicitor, Mr. Brannan, and by the said witnesses, who are of sound mind and of lawful age, and the said witnesses were severally by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid; and the depositions were by me reduced to writing, in the presence of the said witnesses, respectively, and from their respective statements, and after carefully reading the same to the said witnesses, they respectively subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of sealing and directing and depos-
109 iting in the post-office in Chicago the same, with my own hand, to the clerk of the court for which the same were taken.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimoney whereof, I have hereunto set my hand and seal this 19th day of July, A. D. 1866, and of our independence the 91st year.

[SEAL.] J. TILDEN MOULTON,
U. S. Commissioner,
duly appointed by the Circuit Court of the United States for the northern district of Illinois.

[5 ct. rev. stamp.
July 19, '66. J. T. M.]

The foregoing deposition is endorsed: "Opened in court, and filed this 14th May, 1867."

W. G. WOODWARD, *Clerk.*

110 In the Circuit Court of the United States of America, within and for the district of Iowa.

JAMES W. FINLEY
v.
THOMAS M. ISETT, W. C. BREWSTER, and SAGE O. Butler.

THE STATE OF IOWA:

In the above-entitled cause it is agreed that the deposition of Howard M. Holden may be taken before E. Frank Richmond, notary public of the county of Muscatine, in the State of Iowa, at Muscatine, in said county, (who is hereby agreed upon as a commissioner for that purpose,) upon the following interrogations, said deposition

to be used as evidence on the trial of the above cause, on the part of the said plaintiff. The notice required by law to be given to said def't Brewster, and the issuing of a commission from the office of the clerk of the said Circuit Court, are hereby waived. Said deposition to be subject to all just exceptions not herein waived.

Muscatine, Aug. 13, 1866.

JACOB BUTLER, *Att'y for Pl't'ff.*
BRANNAN, RICHMAN & CARSKADDAN,
Att'y for Def't.

111 Deposition of Howard M. Holden, taken before me, E. Frank Richman, a commissioner duly appointed for that purpose, by virtue of the annexed agreement:

Howard M. Holden, of lawful age, being by me first duly sworn, doth, in answer to the following interrogatories, depose and say—

1st interrogatory. What is your name, age, occupation? where do you reside, and are you acquainted with the parties to this suit?

Answer. Howard M. Holden; 29; ex-banker; Washington, Iowa. I am acquainted with the defendants, but not the pl't'ff.

2d int'y. Please state whether or not you had any conversation with Mr. Brewster about the time of the institution of your writ of replevin against S. O. Butler and Isett & Brewster, in regard to a mortgage and notes for $10,000 on Butler's pork-house; if so, what was said by Brewster as to the ownership of said securities?

Answer. I did, in the early part of April, 1865. In answer to my inquiries respecting it, he answered it was a trust matter.

3d int'y. State the definite object you had in view in this inquiry, if you had any such object.

112 (Objected to by def't Brewster, because it is immaterial and irrelavent.)

Answer. I held a large claim against Mr. Butler; felt deeply interested in his affairs. Mr. Brewster claimed the pork that I held as security, and I thought it singular that he should also have a mortgage for $10,000 on his pork-house. I was seeking to learn the facts of the case.

(Answer objected to for same reason.)

4th int'y. State whether, at any time, either before or after the institution of your suit of replevin, any offer was made by Brewster to you to release his claim upon the 700 barrels of pork, and transfer the said notes and mortgage to you upon payment of his claim against Butler, the whole amount of said claim being about $11,000.

(Objected to by def't Brewster, because the subject-matter of the interrogatory was brought out by the complainant, of the def't Brewster, on his examination as a witness, as his own witness, and not in the cross-examination of such matters as the said witness, Brewster, had testified to in his examination in chief.)

113 Answer. I have no recollection that any such proposition was ever made to me.

5th int'y. If any such proposition ever had been made, would it

or not have been likely to have made such an impression on your mind that you would be enabled to recollect it?

Answer. Anything like a formal proposition of the sort would have undoubtedly have done so.

(Question and answer objected to by def't Brewster for irrelevancy and immateriality.)

6th int'y. State whether or not you were desirous of litigating your rights for the pork, or were anxious for an adjustment.

(Question objected to by def't Brewster, because it is immaterial and irrelevant.)

Answer. All I wanted was to get the money that was due me from Mr. Butler. I had no desire to litigate the case surely.

7th. If Mr. Brewster had made a proposition to you to release his claim upon the pork, and transfer the 50 tieres of lard, and the empty tierces, and the notes and mortgage for $10,000 upon the payment of his balance of $11,000 against Butler, would you have accepted or rejected such proposition?

114 (Objected to by def't, Brewster, as immaterial and irrelevant, and because what the witness might have done under an assumed state of facts cannot affect this case, and because it is repetitious of a question already propounded to witness.)

Answer. Had I understood Mr. Brewster as making any proposition of the kind, I should undoubtedly have accepted it.

8th int'y. State whether you ever had more than one conversation with Mr. Brewster in regard to the character in which he held these securities; and if so, whether or not he ever claimed to hold these securities for the benefit of the firm of Isett & Brewster.

(Objected to by def't, Brewster, because the interrogatory does not ask what Mr. Brewster did, but assumes a conclusion or inference in the mind of the witness.)

Answer. I do not remember of ever having more than one conversation with Mr. Brewster relative to this subject. That was the conversation in which he stated it was a trust matter hitherto referred to.

HOWARD M. HOLDEN.

STATE OF IOWA, *Muscatine County, ss:*

115 I, E. Frank Richman, a commissioner duly appointed, as set forth in the annexed agreement, hereby certify that Howard M. Holden was by me first solemnly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition subscribed by him, as above set forth, was reduced to writing by myself in the presence of said witness; that the whole of said deposition was read over to said witness, and was by him subscribed and sworn in my presence, and at the time and place in the said agreement specified.

Witness my hand and notarial seal this 11th day of August, A. D. 1866.

[NOTARIAL SEAL,] E. FRANK RICHMAN,
Notary Public and Commissioner.

Fees, $1 70.

In the Circuit Court of the United States of Amercia, within and for the district of Iowa.

116 JAMES F. FINLEY
v.
THOMAS M. ISETT, WILLIAM C. BREWSTER, and Sage O. Butler.

In the above-entitled cause it is agreed that the deposition of Sage O. Butler may be taken before J. Carskaddan, a notary public of the county of Muscatine, in the State of Iowa, at Muscatine, in said county, (who is hereby agreed upon as a commissioner for that purpose,) on the 3d day of August, A. D. 1866, upon the following interrogatories, said deposition to be used as evidence on the trial of the above cause on the part of the said plaintiff. The notice required by law to be given to said defendant, Brewster, and the issuing of a commission from the office of the clerk of the said Circuit Court, are hereby waived. Said deposition to be subject to all just exceptions not herein waived.

JACOB BUTLER, *Att'y for Pl'ff.*
WM. F. BRANNAN, *Att'y for Def't, Brewster.*
RICHMAN and CARSKADDNA.

Muscatine, Aug. 3d, A. D. 1866.

117 Deposition of Sage O. Butler, taken before me, J. Carscaddan, a commissioner duly appointed for that purpose by virtue of the annexed agreement.

Sage O. Butler, of lawful age, being by me first duly sworn, doth, in answer to the following interrogatories, depose and say:

1st interrogatory. What is your name, age, and place of residence, and are you acquainted with the parties to this suit?

Answer. Sage O. Butler; fifty-seven; Muscatine; I know them.

2d int'y. State whether or not you are one of the defendants to this suit.

Answer. I am.

3d int'y. State whether or not, on the 16th of March, 1865, you executed promissory notes, secured by mortgage on property in the city of Muscatine, known as Butler's pork-house property; and if so, describe the notes, the names of payees and amounts, and for whose use were the same executed?

(Objected to by defendant, Brewster, as to the latter clause,
118 because the instruments speak for themselves, and cannot be contradicted, varied, or explained by parol testimony.)

Answer. I executed five notes of the amounts of two thousand each, payable one, two, three, four, and five years after date, to the order of Messrs. Isett & Brewster on that date, and the notes were secured by mortgage on said pork-house property, interest at 6 per cent. per annum. I understood it they were for the use of James W. Finley, of Chicago.

4th int'y. State fully the circumstances under which these notes were executed, as also the mortgage.

(Objected to by defendant Brewster, if the object and purpose of the interrogatory is to vary, contradict, or explain the within instruments referred to by the question.)

Answer. Apprehending that my season's business would turn out unprofitably, and knowing myself indebted to Isett & Brewster for a considerable amount, and being anxious to secure them so far as I could, I invited Mr. Brewster to my house that evening; after explaining my situation to Mr. Brewster, I proposed to give him certain securities for my debt, and the amount we assumed to be
119 due Isett & Brewster at that time was about eleven thousand dollars. To secure them at that date, I transferred to them a margin on seven hundred barrels of mess pork, which was estimated at $7 00 per barrel; upon which H. M. Holden had advanced $25 00 per barrel, which was due on the 6th and 9th of April; also gave them warehouse receipt upon 1,700 lard and ham tierces, estimated at $2 25, $3,825; also 50 tierces lard, estimated at $2,500 00; in all amounting to eleven thousand two hundred and twenty-five dollars. I gave Mr. Brewster warehouse receipt for the pork, subject to Mr. Holden's claim of $17,500; those we both supposed, at that time, would amply cover Mr. Brewster's claim of $11,000. After that arrangement with Mr. Brewster, I informed him I was anxious to secure Mr. Finley by a mortgage on the pork-house to the amount of $10,000, and asked his permission to make the mortgage notes to the order of Messrs. Isett & Brewster, to be transferred without recourse at some subsequent date, if my business turned out so as to make it necessary to use the
120 notes and mortgage. Mr. Brewster consented to receive the notes in that way, and thought it was right I should do so, considering my relations with Mr. Finley.

5th int'y. State whether or not the [the] original of the letter copied in the bill, of date the 24th of April, of 1865, was by you shown to Mr. Brewster previous to its being by you transmitted to Chicago; and if so, what transpired on that occasion?

Answer. I took the letter to Mr. Brewster; told him I had been unable to go to Chicago, and wanted to explain to Mr. Finley how matters stood; that I had written him, and wanted him (Brewster) to read the letter before I sent it off, that he might see if it was al right. He took the letter and read it, and then handed it back to me with no other reply than "Yes," or a nod of assent—something of that kind. I then sealed the [letter] and put it in the postoffice.

6th int'y. State whether or not, in case Messrs. Isett & Brewster should fail to realize the amount of your indebtedness from the securities you have named, they were to hold these notes and mortgage as security for any part of their claim.

(Objected to by def't, Brewster, because the witness is
121 estopped from impeaching his own deed and contract, or from contradicting, varying, or explaining the written instruments.)

Answer. There was no such understanding.

7th int'y. State whether or not, in the month of Oct., 1865, there was an interview at your house between Mr. Finley (the pl'ff) and Mr. Brewster and yourself; and if so, what transpired at that interview in regard to the payment of the balance then due to Messrs. Isett & Brewster, (the same being about $6,000,) as a condition of the transfer of these notes and mortgage to Mr. Finley.

Answer. There was such an interview in October, but I cannot speak definitely as to what passed there, in detail. The interview at that time was not understood in the same way by Mr. Brewster and Mr. Finley and myself, as I ascertained afterward; but I deny that I admitted any right to those notes except by Mr. Finley.

8th int'y. State whether or not in this interview Mr. Brewster asserted his prior claim to the extent of $6,000 upon these securities; and if so, what was said or done by the pl'ff, Finley, in relation to the said claim of priority?

Answer. I cannot recollect distinctly that Mr. Brewster
122 asserted a positive claim, but the idea was certainly intended to be conveyed that he had that priority. Mr. Finley did not give, in words, an assent to that claim. He said very little during the whole time we were there. He listened, but did not say much.

9th int'y. State whether or not any proposition was ever made by you to Mr. Finley for the execution of a second mortgage; and if so, state the circumstances as fully as you can.

Answer. Between the 10th and 15th of July, 1865, when at Chicago, I told Mr. Finley he had better have the notes and mortgage in his own possession, and when I returned to Muscatine I would send them to him. On my return I asked Mr. Brewster to give me the notes endorsed without recourse, that I might send them with the mortgage to Mr. Findley. Mr. Brewster replied, "I don't like Isett & Brewster's name to go out in that way, as the notes might be offered for negotiation in Chicago or Wall street, and it would look as though we were hard up and obliged to sell our securities." Wishing to obviate this objection on the part of Mr. Brewster, I then wrote to Mr. Findley, (on the 15th July,) proposing to execute
123 a second mortgage, same date and same amount, but to the order of Audley G. Butler, to be endorsed and transferred to Mr. Finley without recourse. I thought a second mortgage would be just as good as the first, if the first was cancelled.

Mr. Finley replied on the 17th July, 1865, objecting to the change, for reasons given in that letter, which I now will produce if required. About that time I became convinced that Mr. Brewster would not give up the notes, and I therefore destroyed the second mortgage, and said and did as little as possible in regard to the original notes, waiting the result of the Holden suit, which Mr. Brewster always expressed the greatest confidence would be decided in his, Mr. Brewster's, favor, and if this result was attained, I thought, of course, Mr. Brewster would surrender the notes and mortgage without giving any more trouble. Mr. Finley's allusion to a second

mortgage in some of his letters, must, I think, have referred to the one spoken of in his letter to me of 17th July, 1865.

(This answer objected to because not responsive to the question, and undertakes to refer to correspondence between himself
124 and plaintiff.)

10th int'y. If you have the letter of Mr. Finley of July 17th, '65, will you please produce it, that it may be made a part hereof?

(Objected to by def't, Brewster, on the ground that the plaintiff cannot give his own declarations and letters to parties other than def't, Brewster, in evidence in his own favor.)

Answer. I have the letter, and herewith produce it.

(Letter marked Exhibit "A.")

11th int'y. State whether or not in June or July, 1865, you had a conversation with def't, Brewster, in relation to suit then pending between H. M. Holden and the firm of Isett & Brewster, as to ownership of seven hundred barrels of pork; and if so, state what was said by Brewster in regard to his swearing as to his trusteeship of these notes and mortgage.

Answer. I cannot speak definitely as to time; 'twas in the summer some time. I asked Mr. Brewster, "if he was called as a witness in the Holden case and he was asked the question if he hadn't other securities by the way of mortgage, what could he answer." He replied, "Why, of course I would swear that it was a trust."

12th int'y. State, whether or not, in the month of October,
125 1865, you was present at conversation between def't, Brewster, and Mr. Higgins, at Isett & Brewster's banking house, Muscatine, and if so, what was said by Higgins and Brewster in regard to taking up of these securities by Higgins, and paying off Isett & Brewster's claim.

Answer. I was not present at any such conversation at Isett & Brewster's banking house; a conversation similar was held at the Ogilvie House, in which Mr. Brewster proposed to sell his claim against me for $5,000. Mr. Higgins declined paying that; but Mr. Kelley was with him and expressed a willingness, (so far as he was concerned,) to take it on those terms. I promised to give them an answer the next day. The next day I declined agreeing to any proposition made at this conversation at the Ogilvie House, and addressed a letter to Higgins, Dean & Co., and James W. Finley, jointly, a copy herewith produced and marked Exhibit "B," which I handed to Mr. Brewster to read, and then handed to Mr. Higgins personally, with the request that he would show the letter to Mr Finley when he returned to Chicago. Mr. Higgins promised to show the letter to Mr. Finley, and that is the last I heard of it, so far as I can recollect.

126 13th int'y. State whether or not, in July, 1865, any conversation occurred between yourself and Brewster as to negotiation of these notes with the Merchant's Exchange of Muscatine, and if so, state what the conversation was.

Answer. Mr. Brewster informed me that he had offered those notes

to the Merchant's Exchange, but they declined negotiating them, and he was sorry that he had offered them. I never suggested it, and if offered at all they were offered during my absence from the city.

14th int'y. State whether the execution of these notes and mortgage was made at the instance and solicitation of Messrs. Isett & Brewster, or either of them, or was voluntary on your part, and if the latter, for whose benefit.

(The latter clause objected to because the instruments are in writing and speak for themselves, and as the grantor, the witness is estopped from questioning or impeaching the right of his grantee, and because the instruments cannot be explained, varied or contradicted by parol testimony, and because the testimony is incompetent.)

Answer. It was voluntary on my part, and I requested Mr. Brewster, as a favor, to allow me to make the notes to Isett &
127 Brewster, to be indorsed by them without recourse, and for the benefit of James W. Finley.

15th int'y. State whether these notes and mortgage were executed before or after the securing of the balance of your indebtedness to Messrs. Isett & Brewster?

Answer. The notes and mortgage were executed after I had secured them (Isett & Brewster) in the manner hereinbefore detailed. My impression is they were executed the next day or within a day or two after I had secured Isett & Brewster, as before detailed. My recollection is not distinct as to time.

16th int'y. State whether at any time or in any manner you ever recognized the right of Messrs. Isett & Brewster to these securities other than as trustees, in the way you have before detailed.

Answer. I have no recollection of having ever recognized the right of any one to a prior lien to Jas. W. Finley. I did not suppose that either Mr. Brewster or myself could dispose of the securities without the consent of Jas. W. Finley.

(The latter clause, in which the witness speaks of his supposition, objected to by def't, Brewster, as incompetent.)

128 17th int'y. Look at the statement of account contained in def't's answer, and state whether or not it is correct.

Answer. It so nearly agrees with my own books, that I believe it is substantially correct.

18th int'y. State the source or sources from which the balance of about $11,000, of 16 of March, 1865, was reduced to the present balance of about $6,000, of May 13th, 1865.

Answer. Mr. Brewster realized about $3,000 from the 1,700 empty tierces, and $2,134 62–100 from 30 tierces of lard. That is all that I know of.

Examination adjourned until August 7th, 9 o'clock a. m.

AUG. 7TH, 9 *o'clock a. m.*

Examination renewed:

Cross-examination.

Int. 1st. In what business were you engaged at the time you executed these securities, and how did your indebtedness to Isett & Brewster arise?

Answer. I was engaged in the pork-packing and provision business, and Isett & Brewster honored my checks (without my having funds on deposit) to a pretty large amount.

129 2d int'y At what time did you commence to draw on them?

Answer. I can't say certainly, probably about the commencement of the pork-packing season; my impression is it was near the middle of November, 1864.

3d int'y. Was there any agreement or understanding between you and Isett & Brewster, that for the advances made on your checks by them, you were to furnish them security if they required it, or thought it necessary?

Answer. Mr. Brewster voluntarily offered to honor my checks until the overdraft should be $10,000, but did not stipulate for any securities for that sum. The only other condition was that he would take my bills of exchange on my correspondents, and that was supposed to be covered by shipments to such correspondents. He took my bills to a very large amount, and they were all paid during the season. I suppose most of the credit items in the account current appended to the answer are the net proceeds of the bills of exchange on my correspondents.

130 4th. int'y. Please report the list of securities which you state you gave to Mr. Brewster for the claim of Isett & Brewster, on the 16th of March, 1865.

Answer. Margin on 700 bbls. mess pork, estimated at $7 00 per bbl., $4,900. Mr. Holden had advanced $25 per bbl., which was due 6–9 Ap'l. 1,700 lard and ham tierces, estimated 2¼, $3,825; also 50 tierces lard, $2,500. In all, $11,225 00–100.

5th int'y. Can you state the amount that was actually realized by Isett and Brewster, on the above securities?

Answer. About $3,000 from the empty tierces, and $2,134 62–100 from the 50 tierces of lard. That's all that I know of. I don't suppose they ever got anything for the pork.

6th int'y. You have stated that Mr. Holden had advanced $25 a barrel on the 700 barrels of pork; if he had any claim on the pork, state when and how the claim arose, and the nature of it, and state fully.

Answer. He advanced $17,500, less the discount on 90-day notes, on the 6th day of January, 1865. Having made the advance,

131 with the privilege of holding the pork 3 (three) months, he took the warehouse receipt of my clerk, O. W. Brown, for the pork, with my written guaranty, and the pork remained on my premises until Mr. Brewster laid claim to it. It was then replevied

out of Mr. Brewster's hands by H. M. Holden, and the pork was not removed from my premises until the replevy.

7th int'y. You say your written guaranty was on the warehouse receipt of Mr. Brown to Mr. Holden. State what that guaranty was.

Answer. I can't recollect. I can tell the intentions. It was that Mr. Brown should hold the pork as security for Mr. Holden until my advance was repaid to him. I expected Mr. Holden to control the pork after the 6th of January, 1865, until my advance was repaid to him, and if sold for more than his advance, I expected to realize the benefit of the surplus. On the 16th of March, I gave Isett & Brewster a claim upon the surplus.

8th int'y. Was the pork sold, and if so, by whom?

Answer. It was sold by S. M. Edgell, of St. Louis, by the order of Mr. Holden.

9th int'y. Do you know who received the proceeds of this sale?

Answer. Mr. Holden received it.

132 10th int'y. Was there any surplus applicable to Isett & Brewster's claim on this pork?

Answer. My impression is that legally Mr. Brewster would have been entitled to a small sum, as in Mr. Holden's account current there were some charges which could not, I supposed and was informed, be legally sustained. My account with Mr. Holden is still unsettled. I refer to the above sale.

11th int'y. Was there any understanding or agreement between the complainant and Isett & Brewster, at or before the execution of the notes and mortgage, that these instruments were to be executed in the name of Isett & Brewster, but to be held by them in trust and for the benefit of the complainant?

Answer. At the time I executed the instruments Mr. Finley was at Chicago. Col. Isett was not in the city, (Muscatine;) and I know of no agreement between the parties spoken of.

12th int'y. Before whom was the mortgage to Isett & Brewster acknowledged?

Answer. I have no distinct recollection, but the records will show. My impression it was before Mr. Richman.

13th int'y. Did your wife join in [in] said mortgage at the

133 time of its execution; and if not, why not?

Answer. She did not, but why she did not I cannot recollect, except that she was probably not asked to at that time.

14th int'y. Did she subsequently release her interest in the mortgaged premises; and if so, who drew up said release?

Answer. She did, but I don't recollect who drew the instrument.

15th int'y. At whose request was this release of dower executed?

Answer. I recollect no request from any one.

16th int'y. Was an examination of the title to the mortgaged premises made at or about the time mortgage or the release of dower was given? If so, by whom, at whose request, and for what purpose, and was such examination reduced to writing?

Answer. I have no recollection as to the date of the examination;

but knowing that there was a large amount of mortgages upon the property uncancelled, which my attorney, Mr. Cloud, had failed to attend to as I requested, I withdrew all the papers from him
134 and gave them to Mr. De Witt Richman, with a correct list, as I supposed, of the mortgages to be cancelled, and requested him to attend to it, and have them all cancelled as soon as possible. If the examination was reduced to writing, I don't know it. I only recollect that I requested Mr. Richman, if Mr. Kelley should call, to tell him exactly how the property stood. I knew how the property stood myself; at least I thought I knew. I didn't want the examination for myself, as I recollect.

17th int'y. I now ask you directly, whether the release of dower of your wife and the examination of title to the mortgaged premises were not procured by you at the express request of William C. Brewster?

Answer. To which I answer, emphatically, no.

18th int'y. Did I understand you to say that you had executed a mortgage upon these premises subsequent to the mortgage now in controversy?

Answer. I executed a mortgage and notes, same date and same amount, which I wanted substituted for the one given to Isett & Brewster, on the consideration of their (Isett & Brewster's) mortgage.

135 19th int'y. Do you remember when these subsequent notes and mortgage were executed?

Answer. I don't remember the exact date. I think it was in the summer of 1865.

20th int'y. Were not these subsequent securities the ones that Mr. Brewster declined to have made in the name of Isett & Brewster, and by them endorsed over without recourse, as you should direct?

Answer. They were not. The object in making them was to release their name from the first notes.

21st int'y. Did you, or not, endeavor to effect a loan of the Merchant's Exchange National Bank, of this city, at or near the commencement of the packing season of last year? And if you answer yea, did you not, at the said banking house, state to the directors of that bank, at the time of making that application, that Isett & Brewster had a mortgage and were satisfied with that security, or words to that effect?

(Objected to, on the ground that it is irrelevant, by complainant's counsel.)

Answer. So far as my business with the Merchant's Ex-
136 change National Bank is concerned, I decline answering unless compelled to, as I do not consider that my answer will be pertinent to this case; and if the directors wish to state what did occur, I have no objections.

22d int'y. Was it not one of the purposes in having the examination and abstract of the title to the mortgaged premises made, to satisfy the Merchant's Exchange National Bank that the only actual incumbrance on the premises was the mortgage of Isett & Brewster, on which there was about $6,000 of actual indebtedness?

Answer. No such examination was ever made by my request, or for any such purpose, to the best of my recollection and belief.

23d int'y. Was there or not a mortgage on these premises for some $7,000, in favor of Thomas Webster, made in May, 1857?

(Objected to by complainant's counsel, on the ground that it is irrelevant and has nothing to do with the issues in this case.)

Answer. There was such a mortgage.

137 24th int'y. Was this mortgage, and the notes to secure which it was made, returned to you by the said Mr. Webster?

(Objected to by complainant's counsel, on the ground that it is irrelevant and is not pertinent to the issues in this case.)

Answer. They were.

25th int'y. Did you not leave these notes and unsatisfied mortgage with Isett & Brewster, intending them to be security for their said claim against you; and on their declining to recognize the validity of this last-named mortgage and notes, did you not then deliver to them the mortgage and notes now in controversy in lieu of the others?

(Objected to by complainant's counsel on the ground previously stated, and the additional ground that the witness is not presumed to have attempted to do that which is entirely contrary to law.

Answer. I have the mortgage in my own possession; Mr. Brewster has the notes. They were considered of no value by Mr.

138 Brewster or myself. The mortgage and notes now in controversy were delivered to Isett & Brewster a long time before.

26th int'y. If the Webster notes and mortgage were considered of no validity by either you or Mr. Brewster, what was your object in leaving them with Isett & Brewster, and why is not the mortgage satisfied upon the record?

(Objected to by complainant's counsel on the same ground as before.)

Answer. I had given Mr. Richman authority to cancel all mortgages, this among them; and in looking over my papers, intending to take them to Mr. Richman, I showed them to Mr. Brewster and explained the situation of them, and the notes have remained with him ever since. Mr. Webster was insane for some years, and actually died in insane asylum at Mount Pleasant, Iowa. That is the reason the mortgage has not been cancelled. The mortgage is in my possession; only the notes are in Mr. Brewster's possession.

SAGE O. BUTLER.

139 THE STATE OF IOWA, *Muscatine County, ss:*

I, J. Carskaddans, a commissioner duly appointed, as set forth in the annexed agreement, hereby certify that Sage O. Butler was by me first solemnly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition subscribed by him, as above set forth, was reduced to writing by E. Frank Richman, who is not interested in the aforesaid suit, in my presence and in the presence of said witness; that the whole of said deposition was read

over to said witness, and was by him subscribed in my presence, and at the time and place in said agreement specified.

Witness my hand and notarial seal this 7th day of August, A. D. 1866.

[NOTARIAL SEAL.] J. CARSKADDAN,
Commissioner and Notary Public.

Fees, $8 00.

Exhibit A.

CHICAGO, *July* 17, 1865.

Mr. S. O. Butler, Muscatine:

140 DEAR SIR: Yours of the 15th inst. received and noted. I telegraph you this morning that the change you proposed to make in the mortgage would not be satisfactory. If you cancel the mortgage to I. & B., and make a new one to yonr son, it will open the door to litigation at once, which I want to avoid; it would have the appearance of fraud, and I do not think I could hold the property under such a transfer. I would prefer to hold the mortgage as given to I. & B., where there is a bona fide consideration to hold the property. If it should be necessary to change the mortgage, it seems to me best to have it made to some other person for my benefit, or make it on my name, but I can see no reason why the notes and mortgage given to I. & B. cannot be transferred, and release them from all liability. I think it decidedly better for you and myself to make no change from I. & B. other than I have named.

Yours, truly,

JAS. W. FINLEY.

Par due and Ward sold mess. pork to-day at limits, 30$.

141 (Copy.)

Exhibit "B."

MUSCATINE, *Oct.* 31, 1865.

Mess. Jas. W. Finley and Higgins, Dean & Co., Chicago:

DEAR SIRS: At the beginning of the last years pork season Messrs. A. D. & Co. applied to me to share my business with Mr. Finley, which I declined to do without consulting Mr. Finley, who had done all my Chicago business for several years. Mr. Finley consented, and I therefore divided my business between you. The final closing of your acc'ts for the season shows me indebted to Mr. Finley, as per his ac. current rendered, $23,605 (6 ?,) 57, and to Mess. H., D. & Co. 24,020 73. It therefore appears that your claims against me on the season's business are about equal. I think it equitable and right that these claims should be paid on the same footing, and therefore I make the following propositions to you jointly, viz: I have executed my notes March 16th for $2,000, each 1, 2, 3, 4, and 5 years, and int. 6 per ct., $10,000 00, secured by recorded mortgage on my

142 pork-house. I propose to execute my notes to be secured by

mortgage on same property Nov. 1st, 1, 2, 3, 4, and 5 years, with interest at 6 p. ct., $2,000 ea., 10,000 00,20 000 00, to liquidate in full your claims as above, and you (M. F. & H.) D. & Co., to divide the notes as you may agree, upon your paying to Messrs. Isett & Brewster $6,000. They will assign to you this claim on 700 barrels, pork, and prosecute the suit for your benefit, and transfer to you the notes for $10,000 first named above. The only mortgage on the property is a note for $750, due 1-4 August, 1864, held by my friends, Messrs. Butler & Tinnel, of St. Louis, Mo.

Should you accept the above, you may feel assured that I shall act for your interest till you are paid.

Very respectfully, your ob't se't,

S. O. BUTLER.

143 In the Circuit Court of the United States for the district of Iowa.

JAMES W. FINLEY
vs.
THOMAS M. ISETT, WILLIAM C. Brewster, and Sage O. Butler.

In the above-entitled cause it is agreed that the depositions of William C. Brewster, Peter Jackson, and S. Brewster Cook may be taken before E. Frank Richman, notary public of the county of Muscatine, in the State of Iowa, at Muscatine, in said county, (who is hereby agreed upon as a commissioner for that purpose,) on the 7th day of August, A. D. 1866, and from day to day until his deposition is concluded, upon the following interrogatories, said deposition to be used as evidence on the trial of the above cause, on the part of said defendant. The notice required by law to be given to said James W. Finley, and the issuing of a commission from the office of the clerk of the United States Circuit Court, are hereby waived; said deposition to be subject to all just exceptions not herein waived.

JACOB BUTLER, *Att. for Plaintiff.*
BRANNAN, RICHMAN & CARSKADDAN,
For Def't.

144 MUSCATINE, IOWA, *August 7th, A. D.* 1866.

Deposition of Peter Jackson, taken before me, E. Frank Richman, notary public, a commissioner duly appointed for that purpose, by virtue of the annexed agreement:

Peter Jackson, of lawful age, being by me first duly sworn, doth in answer to the following interrogatories, depose and say—

1st interrogatory. What is your name, age, and occupation, and where do you reside, and are you acquainted with the parties to the suit?

Answer. Peter Jackson; 50; cashier of Merchants' Exchange National Bank of Muscatine; Muscatine, Iowa; am not acquainted with Mr. Finley, but know the defendants.

145 2nd interrogatory. Are you one of the directors of said bank? if so, how long have you been a director?

Answer. I am, and have been a director since the organization of the Merchants' Exchange, May 15th, 1865.

3rd. interrogatory. State if S. O. Butler, one of the defendants, made an application to the said bank for a loan, at or about the commencement of the pork-packing season last fall, and if so what he said at that time in relation to the condition of his property?

Answer. He made such an application; to the best of my recollection there were two applications made by Mr. Butler, one some time in the latter part of the summer, and one in the first part of November, 1865. I think the first application was for $10,000. The other was for a larger amount. I don't reccollect that he said anything as to the condition of his property at the first application.

146 At the second application, he stated, as I understood, that he had settled up his Isett & Brewster matter all satisfactorily, so that they would not trouble him, and had some other property left, his home stead, some cooperage, salt, and some out-lots, I think he mentioned.

4th. interrogatory. Did you know anything of a mortgage in favor of Isett & Brewster, on the pork-house property of said Butler, for $10,000?

Answer. I have often heard of it from Mr. Brewster, during last summer.

(Objected to—question and answer—by complainant's attorney, as hearsay testimony.)

5th. interrogatory. State when you first heard of the existence of these notes and mortgage.

(Objected to by complainant's attorney, unless the statements he heard were in the presence of complainant.)

Answer. My impression is at present that I understood from Mr. Brewster as early as the spring of 1865, that he had such a mortgage.

(Answer objected to by complainant's counsel for cause above stated.)

147 6th. interrogatory. Do you know if Isett & Brewster, or Mr. Brewster, claimed that mortgage and the notes, as their own property, and for their own benefit, or whether they claimed the said securities, merely as a trust, for the complainant, James W. Finley?

Answer. I understood from Mr. Brewster, that they held this mortgage on Mr. Butler's property, as security for what he owed them; i.e., Isett & Brewster.

Question and answer both objected to by complainants counsel, on the ground that it is not competent to show by the declaration of Brewster, when complainant is not present, anything inconsistent with complainant's rights as claimed in the bill.)

7th. interrogatory. When did you first understand that these securities were thus held by Isett & Brewster, and have you ever understood from them, or either of them, that they held the said secureties differently, or for any other purpose.

148 Answer. I think in the spring of 1865, I first heard they

were thus held by them; I have no recollection of ever hearing from them that they held them differently, or for any other purpose.

(Objected to by complainant's attorney, on the same grounds as before.)

8th. interrogatory. You say you have been connected with the Merchants' Exchange since May 15th, 1865; state in what capacity you have been connected with that institution, from that time to this, and also whether the defendants, the said Brewster and the said Butler, are or have been connected with said Merchants' Exchange, and if so, in what capacities.

Answer. I was president from the organization up to May, 1866, since then I have been cashier; I have been director during the whole time. Mr. Butler has been connected with the said bank as director, during the same period; Mr. Brewster as director, during the whole time, and as cashier from May, 1865, to May, 1866.

149 9th interrogatory. State if your duties, as president, required your presence at the Merchants' exchange, and its successor, Merchants' Exchange National Bank, during the time Mr. Brewster was cashier.

Answer. It did. I was there as regularly as any one is at their business, I guess.

PETER JACKSON.

Fees $1 50.

STATE OF IOWA, *Muscatine County:*

I, E. Frank Richman, a commissioner duly appointed, as set forth in the annexed agreement, hereby certify that Peter Jackson was by me first solemnly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition, subscribed by him as above set forth, was reduced to writing by myself in the presence of said witness; that the whole of said deposition was read over to said witness, and was by him snbscribed and sworn to in my presence, and at the time and place in said agreement specified.

Witness my hand and notarial seal this 7th day of August, A. D. 1866.

[NOTARIAL SEAL.] E. F. RICHMAN,

150 *Notary Public and Commissioner.*

Fees $1 50, paid by def't Brewster.

Deposition of S. Brewster Cook, taken before me, E. Frank Richman, a notary public, a commissioner duly appointed for that purpose, by virtue of the annexed agreement.

S. Brewster Cook, of lawful age, being by me first duly sworn, doth, in answer to the following interrogatories, depose and say:

1st interrogatory. What is your name, age, and occupation, and where do you reside, and are you acquainted with the parties to this suit?

Answer. S. Brewster Cook; 22; Muscatine, Iowa, is my residence; occupation, teller in Merchants' Exchange National Bank. I am acquainted with the parties to this suit.

2d interrogatory. How long have you been connected with said bank?

Answer. Since its first organization, May 15th, 1865, at which time it was the Merchants' Exchange, and in November of 1865, it
151 was changed to Merchants' Exchange National Bank.

3rd interrogatory. State if you were in the employ of Isett & Brewster, and if so, how long and in what capacity.

Answer. I was in employ of Isett & Brewster from August, 1864, until May of 1865, as book-keeper, and acted also as teller.

4th interrogatory. State if you were present in the fall of 1865, at or near the commencement of the pork-packing season, when Mr. S. O. Butler, one of the defendants, made a statement to the directors of the bank, with which you are connected, in relation to the condition of his property, and if so, what that statement was, and for what purpose it was made.

Answer. I was present. He mentioned the condition of his affairs to the board, in order to obtain a loan to carry on pork-packing. He stated the condition of several little matters, and then went on, as follows:

Also, there is the claim of Isett & Brewster, which is fig-
152 ured down to about $6,000 or less, whom I have secured by mortgage, and went on to state that he would be perfectly free to carry on operation, without being interferred with by outside parties.

(Objected to by complainant's at'y, 1st, because not pertinent to the issues in this suit; 2d, if intended to impeach the testimony of Butler, it is not competent, for reason that Mr. Butler's attention was not called to the particular time and place.)

5th interrogatory. Do you remember if Mr. Butler at that time enumerated of what his property consisted?

Answer. I believe he mentioned one or two lots in South Muscatine, and also his homestead on 3d street; said the homestead was not mortgaged, and he did not calculate it shonld be.

6th interrogatory. Do you remember if he stated what was covered by the mortgage he had made to Isett & Brewster?

Answer. I don't remember that he did at this particular time,
153 but from previous conversations I had no doubt that it was a mortgage on the pork-house.

(Objected to by the complainant's counsel, 1st, because the mortgage is the best evidence of what it contained; 2d, because the witness cannot give his impressions, however undoubted, of previous conversations.)

7th interrogatory. You say you had no doubt from previous conversations, that this referred to the pork-house property. State what conversations you refer to, when, and between whom.

Answer. I heard several between Mr. Butler and Mr. Brewster, and perhaps other parties also; don't remember definitely. It was often talked of, and I got the same idea from all the conversations. I can't give the times. There were a good many. The idea I got from all these conversations, was that Mr. Butler had given this

mortgage to Isett & Brewster, (I mean the pork-house mortgage,) to make them in any case perfectly secure.

(Objected to by complainant's counsel, because witness cannot give ideas gathered from various conversations.)

154

8th interrogatory. Do you know whether or not Isett & Brewster have always claimed this mortgage on the pork-house property as their own property and for their own benefit?

Answer. To the best of my knowledge, they always have.

Cross-examination.

1st interrogatory. State whether or not Mr. S. O. Butler has any official connection with the merchants' Exchange National Bank, and if so, what that connection is.

Answer. He is one of the directors.

S. BREWSTER COOK.

($1 50 fees, paid by Brewster.)

STATE OF IOWA, *Muscatine County:*

I, E. Frank Richman, a commissioner duly appointed, as set forth in the annexed agreement, hereby certify that S. Brewster Cook was by me first solemnly sworn, to testify the truth, the whole truth, and nothing but the truth, that the deposition, subscribed by him

155

as above set forth, was reduced to writing by myself in pre-

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sence of said witness; that the whole of said deposition was read over to said witness, and was by him subscribed and sworn to in my presence, and at the time and place in said agreement specified.

Witness my hand and notarial seal this 7th day of August, A. D. 1866.

[NOTARIAL SEAL.]

E. FRANK RICHMAN,
Notary Public and Commissioner.

Deposition of William C. Brewster, taken before me, E. Frank Richman, a commissioner duly appointed for that purpose, by virtue of the annexed agreement.

William C. Brewster, of lawful age, being by me first duly sworn, doth, in answer to the following interrogatories, depose and say:

1st interrogatory. What is your name, age, occupation, and where do you reside, and are you acquainted with the parties to this suit?

157

Answer. William C. Brewster; 37; out of business; Muscatine, Iowa. I am one of the defendants, and know all the parties to this suit.

2nd. interrogatory. Were you a member of the firm of Isett & Brewster? and if so, state what business the said firm was engaged in, and if it is still in business; if not, when it ceased to exist.

Answer. I was; I was a member from the time it commenced a banking business in May, 1855, until it closed in 1865.

3rd interogatory. State if the said firm made any arrangements with the def't, S. O. Buttler, to furnish him means in carrying on his

business during the packing season of 1864-5; and if so, what the arrangement was, and whether any money was so furnished.

Answer. Mr. Buttler came to us in the fall of 1864, stated that he wished to make arrangement for his winter business, and wanted to know what amount of money we would advance him. We told him we were winding up our business, and did not wish to do any
158 more than possible; but we told him we had made an arrangement with Messrs. Chambers, who were packers, to this effect: We had told them that we had a little money that we did not propose to invest, and if they wished to use it during the winter, and pay us interest, we would let them have to the amount of $20,000, upon this understanding: that they would be prepared, at any time that we required the money, to return it; that regardless of market values of products they must repay, when called for. We then said to Mr. Buttler, that if a similar arrangement would suit him, he could have a similar amount. He replied that it would be perfectly satisfactory and liberal, and he would accept it. That was the understanding upon which we commenced business for the season of 1864-5, and upon which we advanced him money, as shown by my answer to complainant's bill, in the account current.

4th interogatory. State if about the middle of March, A. D.
159 1865, you had any conversation or conversations with the defendant Buttler, respecting securitses for the then claim of Isett & Brewster against him; and if so, state fully what transpired at such conversations, and the result of them; and also if you know what the actual amount of the claim then was.

Answer. About that time I received a note from Mr. Buttler, requesting me to call and see him in the evening. We live in the same block, in this city. I did call upon him, when he told me what his financial condition was, and that he did not see how he was to make good his promises of the previous fall, relative to repaying advances we had made him; that owing to the sudden decline of pork products his means of payment were rendered inadequate. I told him I had always relied upon his promise, that whatever should happen, we should be protected; that we still expected that promise made good.

I talked with him about securities that he could give us. He
160 told me that he could give me a lien upon some lard which he would ship to Perdue & Ward, I think, which we could have, and he would give me a warehouse receipt upon some barrels and tierces. He told me that there was some pork Mr. Holden had made an advance upon, and proposed to give me a lien upon that; that Mr. Holden held the same by warehouse receipt, but he thought by the time that Holden's claims matured, there would be a margin. He said that he would look over his matters, and see what further he could give us. I left him with that understanding. A day or two after that he called upon us, Isett & Brewster, and handed me a package, which appeared to be in the original express receipt, as he had received it from St. Louis, and told me he would leave that as further security. The package contained account current between S. O. Buttler and Thomas Webster, a mortgage, three notes, and a

letter dated May 28th, 1857, all of which are attached hereto, marked Exhibit A, excepting the mortgage, which is now in
161 my possession. I took them, and referred the mortgage to Mr. Richman, who was my attorney. He told me that it was worthless. I saw Mr. Buttler, and told him what he had said; that I thought he had better give me another mortgage, and wipe this one out. He said he would do so; but I did not get the other mortgage for some, I should say, two weeks. He then brought me in the mortgage and notes in controversy.

(Counsel for plaintiff objects to so much of question and answer as refers to conversations, and the result of the same, between the said Brewster and Buttler on matters not referred to in the testimony of said Buttler; and also as to what transpired between said Brewster and his counsel, Mr. Richman, on occasions when complainant was not present.)

5th interrogatory. Will you state if the Webster notes, made part of Exhibit "A" were secured or appeared to be secured; and if so, in what manner, and on what?

Answer. They appeared to be secured by a mortgage on Mr. Buttler's pork-house property in Muscatine.

162 6th interrogatory. You say that he brought the notes and mortgage now in controversy to you in place of the Webster mortgage and notes. Will you state for what purpose the notes and mortgage now in controversy were given you, and what agreement, if any, you had with Buttler in relation to them?

Answer. When he brought the notes now in controversy to me, he remarked, you have more securities now than will be sufficient to protect your claim. I have made this mortgage an even $10,000 mortgage, and I wish you, when your claims are paid, to make such disposition of the collaterals as I may direct, either to hold them, or to transfer them to other parties. We told him that arrangement was perfectly satisfactory, and that we would do as he requested.

7th interrogatory. Was there anything said as to the order in which you were to resort to the different securities.

Answer. There was an understanding that I would make the money out of collaterals, if available, and that I would make it out of those that would bring the money quickest—lard, barrels,
163 and pork—before resorting to the mortgage.

Examination adjourned until 1 o'clock.

Examination resumed at 1 o'clock p. m.

8th interrogatory. Do you know what amount you realized in fact, out of the securities?

Answer. I realized from the lard $2,134 62-100; barrels and tierces, $2,944 32-100. That is all.

9th interrogatory. Can you tell the time at which you realized said amount?

Answer. I believe in May, 1865, at the dates 7th and 13th, credits, as it appears in statement account current annexed to the answer.

10th interrogatory. Did you realize anything from the 700 barrels of pork?

Answer. We did not.

11th interrogatory. State if you had any conversation with complainant in relation to matters in controversy in this suit in the month of May, 1865; and if so, what time in May, and where did the conversation take place?

164 Answer. Isett & Brewster transferred their deposit on the 15th of May, 1865, to the Merchant's Exchange. In view of that it became necessary for me to go to Chicago about the first of May. Mr. Buttler knowing I was going, called upon me, and requested me to call upon Mr. Finley, and say to him that he had not forgotten him, and would endeavor to do something for him. I did call upon Mr. Finley; was introduced by Mr. Chambers at Mr. Finley's office, in Chicago.

12th interrogatory. Did you in that conversation state that the debt of Isett & Brewster against S. O. Buttler was of small amount, and that it would not be in the way of complainant's settling his claim with Buttler?

Answer. I did not make any such statement.

13th interrogatory. Did you say to the complainant at that time that you (meaning you and Buttler) would be able to come on and settle all claims, and would not do it with mortgages, but would be able to do it with money.

165 Answer. I did not.

14th interrogatory. Do you remember the conversation that took place between you and Mr. Finley at that time? and if so, state it.

Answer. I do; I told Mr. Finley, after being introduced to him by Mr. Chambers, that I had called upon him at Mr. Buttler's request. Mr. Buttler had expressed a desire to me, to do something for him; and I supposed he would authorize me to transfer to him such collaterals as I held, when the claim of Isett & Brewster was paid. I told him just what collaterals I held; that I had a warehouse receipt for some barrals and tierces, a mortgage on his pork-house property for $10,000, about 50 tierces of lard, and a claim on 700 barrels of pork then in suit; that I did not know how that suit might terminate, as it was in law; but if we gained the suit that there would be enough to go a long ways towards paying his claim, and that if we did not gain the suit, we still held in our hands collaterals more than

166 sufficient to pay our claim. I told him that I had but a short time; that I had an engagement to go upon the gold board; was with him about 10 or 20 minutes.

15th interrogatory. Were the securities in controversy offered to the Merchants' Exchange for discount in July of 1865? and if so, at whose instance? State all the circumstances fully.

Answer. Some time in the 1st part of July, 1865, Mr S. O. Buttler being anxious to have his indebtedness to Isett & Brewster paid, inasmuch as I was cashier of the Merchants' Exchange, and it was very unpleasant for him to apply for discounts to the banks through me,

while I held such an indebtedness against him, said he thought the bank would make an advance on that mortgage and notes, as they had surplus funds that they found no call for, and thought we had better try and see if we could not get the bank to make an advance sufficient to pay my claim. I told Mr. Buttler that if we went before the board, we must do so with clean papers, and that the
167 mortgage I had was not signed by his wife, and that I knew nothing about the title; that it would be necessary for him to get a release of dower from Mrs. Buttler, and have the title examined. He said that he would do so; I then requested him to call upon Mr. Richman, so that the release might be properly drawn, and abstract of title made out. He said he had better take the abstract that I had, (being the abstract he gave me at the time he gave me the mortgage,) and have it brought down to date. The old abstract was down to about June, 1857. A day or two afterwards, Mr. Buttler, having told me that the release of dower was perfected, and that Mr. Richman had examined title, I called upon Mr. Richman, who also told me such was the case. As the first meeting, I think, of the board of directors of the Merchants' Exchange, this mortgage and notes were offered as the basis of a loan, they being the collateral, Mr. Buttler offering his own paper as the principal. (The abstract of title referred to is hereto attached, marked Exhibit "B," and is made a part of the answer of the witness.) The
168 application was refused by the board, they declining to advance money upon mortgage security.

16th interrogatory. Did you have any conversation other than that referred to in your answer to the proceeding interrogatory, with the defendant Buttler, in regard to raising money on these securities, for the payment of your claim?

Answer. Prior to, and subsequent to, the 15th of July, Buttler and I had frequent conversations about raising sufficient money on this mortgage to pay the claim of Isett & Brewster; several of these conversations took place in the office of the Merchants' Exchange Bank.

17th interrogatory. Did the defendant, Buttler, offer any opposition to raising money by this means for the payment of your claim?

Answer. He always expressed himself as anxious to raise sufficient money upon this mortgage to pay the claim of Isett & Brewster, so that I, as cashier of the Merchants' Exchange,
169 would be square with him.

18th interrogatory. Did you have an interview with the complainant and defendant, Buttler, at the house of said Buttler, in October last, in relation to these securi ties?

Answer. I did.

19th interrogatory. Did you in that interview assert your priority to these securities? and if so, was such priority questioned or disputed by the complainant or the said Buttler?

Answer. In the course of the conversation, wishing to make Mr. Finley a proposition to pay off this claim of mine. I stated clearly and distinctly my priority to the mortgage and Holden suit; and it was neither questioned or disputed by the said complainant nor the

said Buttler. In this connection, I will refer to my letter to J. W. Finley, dated, Muscatine, October 25th, 1865, and incorporated in my answer to the bill of complaint and his reply thereto, dated Chicago, October 27th, 1865, also incorporated in my said answer, the original of which I herewith produce, marked Exhibit "C," and made a part of my answer. I also file three other letters from complainant to said Buttler, of dates, October 20th, 1865, October 24th, 1865, and October 27th, 1865, all of which are embodied in my said answer to complainant's bill, the original being made a part of my deposition, marked respectively Exhibits "D," "E," and "F."

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20th interrogatory. Was the letter of S. O. Buttler to J. W. Finley, copied in the complainant's bill, purporting to be of date April 24th, 1865, shown to and read by you at or about that time?

Answer. It was not.

21st interrogatory. Where did you first know of said letter?

Answer. About the 10th of December, A. D. 1865.

22nd interrogatory. Was your right to, or property in, these securities ever questioned before December 10th, 1865, by either complainant or Buttler?

Answer. It never was in my presence, nor in any way to the best of my knowledge.

23rd int. Did you have any conversation with the complainant in December last? and if so, did you in that conversation refer to this alleged letter of April 24th, 1865, from Buttler to him? and if so, what reason, if any, did he give for not reminding you of it?

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Answer. I did have a conversation with him at the office of the Merchants' Exchange National Bank in the middle or latter part of December, 1865. I asked him a question as follows: Why did you not, Mr. Finley, as a man, say something to me about this letter, purporting to have been written by Mr. Buttler to you, on the 24th of April, prior in your conversation with me at Mr. Buttler's house, in October? He replied, it was because Mr. Buttler "requested me to keep it confidential." I remarked that I thought that was strange.

24th interrogatory. Did you have a conversation with Mr. Levi Higgins and Mr. Kelly, in said Buttler's presence, in relation to these securities, in the month of October, 1865? and if so, was there anything said between you about selling said notes and mortgages to the said Higgins or Kelly? and if so, what was said?

Answer. I had such a conversation in the presence of Mr. Buttler. The object of writing my letter of the 25th of October to the complainant at Chicago, was to know definitely whether or not he was going to pay the claims of Isett & Brewster against Buttler, and take all the securities we had. In that letter I stated that Mr. Higgins was here, and that I wanted an answer to my letter by return mail. Mr. Finley replied, declining my proposition—reference being had to his letter of October 27th, 1865, copied in my answer to complainant's bill. On receiving said letter, I made a similar proposition to Mr. Higgins who was here endeavoring to

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close up his affairs with Mr. Buttler, and received a counter proposition to pay me $5,000. Whether this propsition came direct from Mr. Higgins, or from Mr. Kelly, who was interested with him in the Buttler indebtedness, I cannot say positively; but Mr. Higgins, Mr. Kelly, and Mr. Buttler were all present at the time.

(Complainant's counsel objects to so much of the foregoing answer, and all previous answers of witness, as refers to conversations or propositions to persons other than complainant, except as con-
173 tradictory to the testimony of witnesses examined by complainant; and also as to the contents of any and all letters not produced or made a part of the bill or answer in this case.)

25th interrogatory. Do you remember having a conversation with Mr. Higgins in April, in 1865, in which Mr. Higgins states you spoke of these securities, the ones in controversy, as being trust matters?

Answer. I do not recollect of ever having had any such conversation with Mr. Higgins; but I will say that I never have claimed these, or any of the securities, as exclusively Isett & Brewster's. They were trust matter, and to be transferred by us, when our claim was satisfied, as Buttler might direct.

26th interrogatory. Do you recollect having told said Higgins at any time prior to April 18th, 1865, that the defendant, Buttler, was not indebted to your firm; and if so, when did you tell him this?

Answer. I recollect no such conversation. I certainly did not in April, 1865; and if I did at any former time, it must have
174 been in the summer or fall of 1864, during which time Mr. Buttler, so far from owing us anything, had money on deposit with us.

27th interrogatory. Did the defendant, Buttler, on or about the 15th of July, 1865, request you to endorse these securities, without recourse, and deliver them to the complainant?

Answer. He did not. On or about the 15th of July, 1865, Buttler made out a release of dower upon the same premises, and had title examined to enable us, Buttler and Isett & Brewster, to get an advance on the said securities from the Merchants' Exchange, sufficient to pay our claim.

28th int. Do you remember saying to the defendant, Buttler, I don't like Isett & Brewster's name to go out in that way, (that is, as endorsers of paper without recourse, as the notes might be offered for negotiation in Chicago or Wall street, and it would look as though we were hard up and obliged to sell our securities,) or words to that effect? and if so, state in what connection these words were used, and to what they had relation.

175 Answer. Some time in [in] 1865 Mr. Buttler came to me and said that he had made out a second $10,000 mortgage on his pork-house to order of Isett & Brewster, and wished us to endorse it, without recourse, that he might send it to—I don't remember to whom. To which I replied in language similar to that embodied in the question. I thought, at the time, that given in that way, without any consideration, that we were not called upon to spread our names to the world, and that the instrument itself might prove of little value.

29th interrogatory. State, if you know, whether the defendant, Buttler, desired to effect a loan of the Merchants' Exchange last fall; and if so, state if he made any representations at that time as to the condition of his property, to the directors of said institution; and if yea, what such representations were, and your means of knowledge.

Answer. He did. I was present at a meeting of the board, as a member thereof; Mr. Butler said that he had some out-lots that were unencumbered, and an indebtedness in Muscatine, not
176 exceeding $1,500, aside from his indebtedness to Isett & Brewster, which he had secured to their satisfaction by a mortgage, and they were willing to wait upon him. He also referred to his property upon the hill as unencumbered—I suppose meaning his homestead.

Cross-examination.

1st interrogatory. When was the lard and pork and tierces given to you as your security for the balance?

Answer. To the best of my recollection, it was about the 16th of March, A. D. 1865.

2d interrogatory. What was the character of the transfer of these properties?

Answer. The tierces, barrels, and pork by warehouse receipt, and the lard, I think. A few days after that I received a bill of lading for, with a draft for about what we supposed it would bring in the New York market. I don't think I ever had a warehouse receipt for the lard. Subsequently I took a chattle-mortgage for the pork.

3rd interrogatory. Can you produce copies, or the original, of the above warehouse receipts and chattle-mortgage?

177 Answer. I will the chattle-mortgage and the warehouse receipts, if I can find them. (Chattle-mortgage hereto attached and marked Exhibit "G.")

4th interrogatory. How long after the delivery of the above securities was it until Mr. Buttler delivered you the $10,000 notes and mortgage in controversy?

Answer. I think I received them about 20 or 25 days afterwards.

5th interrogatory. What was the rate of interest and commission, if any, for your advances to Mr. Butler?

Answer. Ten per cent. interest, and there were no commissions. Whenever he presented bills on Chicago or New York, we charged the usual exchange or discount. My impression is that our rate that winter varied from $\frac{1}{4}$ to $\frac{1}{2}$ per cent. discount.

6th interrogatory. Will you state whether or not, on the 16th of March, the date at which you took the above securities, there was any margin on the 700 barrels of mess pork beyond the amount of M. Holden's claim; and if so, what the amount of that margin was?

Answer. My impression is, that the margin was very small.
178 I cannot state just what it was, but I took the lien, thinking there might be more of a margin by the time of the maturity

of the claim upon the pork. That was the inducem'nt in my mind at the time.

7th interrogatory. Did you have any conversation with H. M. Holden during the progress of the replevin suit for the 700 barrels of pork, or about the time of its institution, as to the ownership of the mortgage and notes in controversy? and if so, did you or not admit and claim to him that you held these securities, not for your benefit, or that of Isett, but in trust for another party or parties?

Answer. During the progress of the replevin suit, Mr. Holden called upon me several times, wishing me to release the pork in suit. He came in one day and said, you have got, in addition, a mortgage for $10,000 upon Mr. Butler's pork-house, and asked me if Butler owed us that much more. I told him that he did not; that it was a trust matter; that when our book account was paid, it, with
179 other collaterals, would be transferred as Mr. Butler might direct. I did not design to convey to him any such idea—that Isett & Brewster had not an interest in that mortgage. I will not say positively, but speaking from a very distinct impression, I intimated to him at that time that he could have this mortgage and all other collaterals we held, if he paid our claim.

8th interrogatory. Did you, in any of your conversations with Holden, state or intimate to him that you were ready to surrender your claim upon the 700 barrels of pork, and transfer these securities, upon the payment by him of the balance of your account, being about $6,000? and if you state that you did make such a proposition, or intimated your willingness to thus do, please state when and where such proposition or intimation was made.

(Objected to by defendant Brewster, for the reason that it refers to conversations without specifying time and place, and, if intended for subsequent impeachment or contradiction, the legal foundation has not been laid.)

180 Answer. I have just stated my impression, that he could have the securities by paying my claim, but at that time it exceeded $6,000. I believe they were made in the banking house of Isett & Brewster, in and about the month of May or April, 1865. I several times said to Mr. Holden that I did not think it worth while to have a lawsuit about the 700 barrels of pork. I thought that we could compromise it.

9th interrogatory. Did you or not, in the replevin suit, claim that you were the absolute owner of the 700 barrels of mess pork? and if, as you now state, you held the same as collateral, why did you not set that fact forth in your pleadings in that case?

(Objected to by defendant Brewster, for the reason that, in that case, the pleadings speak for themselves, and that it is irrelevant and immaterial to the issues made in this cause, and for the further reason that the question assumes matters as facts that have not been hithero shown in the examination.)

181 Answer. I fought that suit strictly on legal grounds. I placed the whole case in the hands of my attorneys, with my understanding of the facts.

(Complainant's counsel offers in evidence the record of the case H. M. Holden against S. O. Butler and Isett & Brewster, in the District Court of Muscatine county, which is objected to by defendant, Brewster, as irrelevant, immaterial, and incompetent to the issues in this case.)

10th interrogatory. State, if you can, Mr. Brewster, the months, and the days of the months, on which you had conversations with H. M. Holden on the subject of the ownership of the 700 barrels of mess pork, and his claim upon the same.

(Objected to by defendant's counsel, as not being legitimate cross-examination, as irrelevant and immaterial? and if intended for purposes of subsequent impeachment or contradiction, the question is illegal and improperly framed.)

Answer. I do not remember any conversations, except in the months of April and May, 1865, and December and January following. As to the days of the month, I cannot give them, and
182 don't know that I have any memoranda that will enable me to do so. I answer this as defitintly as my recollection enable me to.

W. C. BREWSTER.

THE STATE OF IOWA, *Muscatine County:*

I, E. Frank Richman, a commissioner duly appointed, as set forth in the annexed agreement, hereby certify that William C. Brewster was by me first solemnly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition subscribed by him, as above set forth, was reduced to writing by myself, in the presence of said witness; that the whole of said deposition was read over by said witness, and was by him subscribed and sworn to in my presence, and at the time and place in said agreement specified.

Witness my hand and notarial seal, this 9th day of August, A. D. 1866.

E. FRANK RICHMAN,
Notary Public and Commissioner.

183 *Exhibit A.*

SAINT LOUIS, *Sept. 25th*, 1850.

S. O. Butler, esq., to Thomas Webster & Co.:

To amount of his indebtedness, this date, as p. notes, at 1d'd, executed in St. Louis, on said date, viz:

2 notes, $2,500 each	$5,000	00
1 do.	2,525	07
	7,525	07
To interest on said amount, to 1st May, 1857, a 6 per cent.	2,978	65
	$10,503	72

CR.

May 1st, 1847.

By his note in favor	Thomas Webster,	a 18 mo.	from this date.	$10,000 00
By do.	do.	do.	24 mo	1,000 00
By do.	do.	do.	30 mo	1,500 00
By do.	do.	do.	36 mo	2,000 00
By do.	do.	do.	42 mo	3,000 00
By do.	do.	do.	48 mo.	2,003 72
				$10,503 72

The above notes, all dated at Muscatine, Iowa, and payable at the Bank of the State of Missouri, St. Louis.

T. WEBSTER & CO.
By T. WEBSTER.

184 *Exhibit A.*

$2,000. MUSCATINE, *May 1st*, 1857.

Thirty-six months after date, I promise to pay to the order of Thomas Webster, of St. Louis, two thousand dollars, value received, payable at the Bank of the State of Missouri, St. Louis.

S. O. BUTLER.

Exhibit A.

$3,000. MUSCATINE, *May 1st*, 1857.

Forty-two months after date, I promise to pay to the order of Thomas Wesbter, of St. Louis, three thousand dollars, value received, payable at the Bank of the State of Missouri, St. Louis.

S. O. BUTLER.

Exhibit A.

$2,003 73-100. MUSCATINE, *May 1st*, 1857.

Forty-eight months after date, I promise to pay to the order of Thomas Webster, of St. Louis, three thousand and three 72-100 dollars, value received, payable at the bank of the State of Missouri, St. Louis.

S. O. BUTLER.

185 ST. LOUIS, 28*th May*, 1857.

MRS. S. O. BUTLER.

MY DEAR MADAM: Enclosed you vill find three notes in the agregate amounting to $7,003 72, which notes you will please hold or dispose of, under the advice of whomsoever you may consider your best friend. You are well acquainted with the maker of the notes, and I am well satisfied that your feelings towards him are such that there is no danger of your exercising your legai rights in any manner which might prove harrassing to him; and I am equally certain you will not

transfer these to any one whose feelings of kindness are less ardent toward him than your own. I am compelled to assign these notes to youby a sentiment of regard which extends equally to the maker and yourself. And in making the assignment to you exclusively, I am governed by considerations of prudence and expediency. I trust we may all live to see the day when both, he and I, may have the satisfaction of paying all our debts in full, irrespective of every legal formality which may absolve us from the necessity of doing so,
186 and I am certain my present action may be promotive of such a happy consumation rather than tend to retard it. With sentiments of esteem fully shared in by my wife.

Yours, etc.,

THOMAS WEBSTER.

A mortgage in security of the notes accompains them.

Statement of the incumbrance on the property known as S. O. Butler's pork-house, being that conveyed to Sage O. Butler, by James N. McFadin, Anne T. McFadin, his wife, and Mils Sels, by deed dated first day of May, A. D. 1855, and recorded 19th day May, 1855, among the records of Muscatine county, Iowa, in Book "O," at page 382.

Incumbrance.

S. O. Butler to Hitchcook, trustee for McFadin, Sills & Co.:

Deed of trust to secure payment of notes for—

$2,500,	at	12 mo.	Date May, 1'55, being at 6 p. cts.
1,980	"	16 "	
1,600	"	20 "	
3,000	"	24 "	
2,000	"	30 "	
$11,000			

[Canceled.]

187 Dated 1st May, 1855. Recorded May 19, '55. Book "O," 383 4-5.

S. O. Butler to Henry Ames & Co.:

Mortgage to secure payment of note for $5,843 75 pay'd, Feb. 1, '56, date May 15, '55, bearing interest 10 p. ct., dated 15th May, 1855. Recorded Dec. 20th, '55, Book "P," 206.

[C.]

Exhibit B.

Of the above incumbrances, the notes for $1,900, a 16 months, $1,600, a 20 mo's, and $30,000, at 24 mo's, are in the possession of S. O. Butler; and the ac. current to 5th April, 1861, of Henry Ames & Co., with S. O. Butler, show that they hold all the other notes, ($2,500, a

12 mo's, $2,000, a 30 mo's, and the $5,843 75, due Feb. 1'53; and that the full balance then owing them thereon to us two thousand and ninety-seven 66-100 dollars, ($2,097 66.) Both incumbrances are unsatisfied of record.

S. O. Butler to Wm. Risley:

188 Mortgage of 50×140 feet, near the N. W. corner of the premises, to secure payment of two notes for $455 50, a. 1 year; 455 50, a. 2 years, date Sept. 24, '56, bearing interest a. 6 per cent. Dated 24th September, 1856; recorded Oct 1, '56, Book "Q," 468.

[Cancelled.]

The notes of the above incumbrance have been shown to us by S. O. Butler, and as appear by payments made and endorsed thereon, the whole amount due on same to 7th January, A D. 1860, was three hundred and thirty-one 01-100 dollars, ($331 01.)

S. O. Butler to Joseph C. Butler:

Mortgage to secure payment of notes for $700, due May 1, '58; $900, due May 1, '58; $800, due Nov. 1, '58; $800, due May 1, '59; $1,500, due May 1, '59, dated Ap. 28, '57—$4,700.

Dated April 28, 1857. Recorded May 14, '57, Book "S," 133-4.

The notes of the above incumbrance are cancelled, and are, together with the mortgage, in the possession of S. O. Butler.

189 *Exhibit "B."—Mortgage not satisfied of record.*

S. O. Butler to Thomas Webster:

Mortgage to secure payment of notes for	$2,000 00,	a 36 mo's.
"	3,000 00,	a 42 mo's.
"	2,003 72,	a 48 mo's.
		date May 1, '51.
	$7,003 72	

Date 1st May, 1857; recorded June 20, '57, book "S," 210-11.

The forgoing is a statement of the incumbrances on the property aforesaid since the said purchase of same by S. O. Butler, on the 1st May, A. D. 1855, up to the date of the said mortgage to Thomas Webster. Upon payment of the balance of $2,097 66, due H. Ames & Co., as per their account on the 5th April, 1861, and the balance of $331, due Jan. 7, '60, on the W. Risley notes, the next lien would be the said mortgage to Thomas Webster.

190 Since the foregoing statement was made, we find the following incumbrances on the pork-house property:

S. O. Butler to E. E. Sloan:

Mortgage to secure prom. note for $890 77, date May 25, '58, at one year, with interest. This mortgage covers all buildings, machinery,

lard, tanks, &c., and is dated May 25, '58. Recorded Jan. 12, '59, book "T" of lots, p. 460.

["Cloud says paid, but not released."]

S. O. Butler to Joseph C. Buttler.

Mortgage to secure five notes for $500 each, dated 4, '60, payable at 6, 12, and 18 mo., 2 years', and 30 months, payable at Commercia lB'k., Cin., O.; payable to order of Jos. C. Buttler, and conditioned to save him harmless as indorsed. Mortgage is on same property as last above described, dated Jan. 4, '60; recorded Feb. 25, '60, book "U" of lots, p. 164.

["Released, but not recorded."] (I think it is.)

Exhibit B.

191 S. O. Buttler & wife to Amos Cutter and Jacob P. Tinnel.

Mortgage to secure five prom. notes for $700, at 7 mo's.
700, at 12 mo's.
800, at 18 mo's.
800, at 24 mo's.
750, at 30 mo's.

Dated Feb. 1, '62; interest not named.

On same property; dated Feb. 1, '62; recorded Feb. 6, '62, book "V" of lots, p. 26.

192 S. O. Buttler to Isett & Brewster:

Mortgage to secure five notes of $2,000 each, dated March 16, '65; payable at 1, 2, 3, 4, and 5 years, with 6 per cent. interest. Mortgage on same property, (only lard tank not named,) dated March 16, '65; recorded April 4, '65, book "W" of lots, p. 607.

We find no other incumbrances nor liens. We did not look up taxes.

RICHMAN & CARSKADDAN.

July 14, 1865.

Exhibit C.

CHICAGO, *Oct.* 27, 1865.

Mr. W. C. Brewster.

DEAR SIR: Yours of the 25th inst. received. Your statement of the proposition you made me at Mr. Butler's house is correct. Mr. B. and I had had several previous conversations about the matter, and he had in all cases assured me that he would give me a mortgage on the property. The proposition you now make for Mr. Butler;
193 that is, in consideration of my paying your claim of $6,000, you will transfer to me your mortgage and your interest in

the bank claim; this I must decline. I prefer to take a security mortgage on the property to the proposition.

Yours truly,

JAMES W. FINLEY.

This is same writing as two letters copied this day by me, from James W. Finley to S. O. Buttler.

March 12, '66.

E. A. RICHMAN.

Exhibit "D."

CHICAGO, *Oct.* 20, 1865.

Mr. S. O. Butler.

DEAR SIR: Since my return home I have thought over Mr. Brewster's proposition, and don't see that I can better my situation by paying his mortgage. It would give me a clean title to the property, which would be very desirable; but as I understand you and Mr. Brewster, this mortgage was given with the intention of protecting my interest as well as Mr. B.'s, when Mr. B.'s claim was satisfied, the transfer of the property to be made to me. This is the
194 way I understand my position now. If I am not correct, I want you to inform me. You have always assured me that my interest should be taken care of, and I shall expect it.

Yours, truly,

JAMES W. FINLEY.

These are same writings as two letters copied by me this day, from James W. Finly to S. O. Buttler.

March 3, '66.

E. F. RICHMAN.

Exhibit E.

CHICAGO, *Oct.* 24, 1865.

Mr. S. O. Buttler, Muscatine.

DEAR SIR: Yours of the 23d inst. received. In my letter of the 20th inst. I had referred to the mortgage of I. & B., and not to the security mortgage. I thought it was understood between you and I, that I was to have the additional mortgage of $10,000 on the property, whether I paid I. & B. mortgage or not. I did not think that had anything to do with security mortgage. The object in paying I. & B. claim was to get a clean title to the property. According to my understanding, you have no right to give that security
195 mortgage to other parties. It was made for my benefit, and I expect it in fulfillment of your agreement. I cannot control I. & B. mortgage. If I was in a situation, I would advance the amount and take their mortgage; but it is not convenient to do so now, and therefore must let it rest for the present. I understood you to say that you held this security mortgage, and in case of any indication of suits, you would have it recorded for my benefit.

I don't understand that I was to pay I. & B. claim to get the security mortgage, but only the first; and in case I paid their claim, I would hold both. I think I have made my views plain this time, and hope to hear from you on receipt of this.

Yours, truly,

JAMES W. FINLEY.

Exhibit F.

CHICAGO, *Oct.* 27, 1865.

Mr. S. O. Butler, Muscatine.

DEAR SIR: I am in receipt of Mr. Brewster's letter of the 25th inst., and have answered it, declining the proposision he makes; that is, in consideration of my paying his claim of $6,000, he will
196 transfer to me his mortgage of $10,000 and his interest in the bank claim. I prefer a security mortgage to this proposition. In disposing of your property, I shall rely upon your previous promises, and if you cannot do any more for me, give me the security mortgage.

I will be pleased to know how you arrange your matters.

Yours, truly,

JAMES W. FINLEY.

Know all men, that I, Sage O. Buttler, of Muscatine county, State of Iowa, in consideration of the sum of ten thousand (10,000) dollars, the receipt whereof is hereby acknowledged, do by these presents sell and convey unto Isett & Brewster, partners and bankers, of the county of Muscatine and State of Iowa, the following described personal property, to wit, seven hundred barrels of mess pork, now in my pork-house in the city of Muscatine, the same being set apart and marked as follows, to wit, letter "H" on the heads of
197 the barrels; to have and to hold said property unto the said Isett & Brewster, their heirs and assigns, forever.

Provided, however, that whereas I am indebted to said Isett & Brewster in the sum of ten thousand dollars, now, if I shall pay to said Isett & Brewster, or their order, the said sum of ten thousand dollars on demand, with interest thereon, then this conveyance to be void, otherwise of full force. Witness my hand this first day of April, 1865.

SAGE O. BUTTLER.

Exhibit "G."

STATE OF IOWA, *Muscatine county:*

I do hereby certify that before me, D. C. Richmond, a notary public in and for said county, personally appeared the above-named Sage O. Butler, who is persoually known to me to be the identical person whose name is affixed to the above conveyance as grantor, and acknowledged the instrument to be his voluntary act and deed, for the purpose therein mentioned.

Witness my hand and notarial seal, this first day of April, A. D 1865.

[SEAL.] D. C. RICHMAN,
Notary Public.

[Rev. stamp for $10 00.]

Received for record this 1st day of April, A. D. 1865, at 11½ o'clock a. m., and recorded in Book F, chattels, on p. 503, 504.

CHARLES S. FOSTER,
Recorder.

[Rev. stamp for 10 00.]

198 [Copy.]

District Court, June term, A. D. 1865.

HOWARD M. HOLDEN
vs.
SAGE O. BUTTLER.

1st. Howard M. Holden, plaintiff, complains of Sage O. Buttler, defendant, for that the said defendant wrongfully detains and holds possession of six hundred and eighty-four barrels of mess pork, each of which barrels is marked as follows, to wit, "S. O. Buttler, packer, Muscatine, Iowa. 200 lbs. mess pork. H," and immediate and present possession of which plaintiff claim and is entitled to as the owner thereof.

2d. That the value of said property is twenty-three dollars a barrel, or altogether the sum of $15,732 (dollars.)

3rd. Plaintiff further shows that the facts constituting his claim are as follows: On the 6th day of January, 1865, for a valuable consideration in hand paid by plaintiff to said defendant, the said defendant delivered to one O. A. Brown, then the bookkeeper of said defendant, four hundred and twenty-six bbls. of the said lot of
199 pork, the same being in a pile by itself, on the pork-house lot of said defendant, and one hundred and seventy-four barrels in the cellar of his packing-house, for which said Brown executed his warehouse receipt for seven hundred barrels of mess pork, one hundred barrels of which were to be made from hogs then in store in the packing-house of said defendant; that after the manufacture and delivery to said Brown of said last-mentioned one hundred barrels of mess pork, and previous to the 10th day of March, A. D. 1865, the said seven hundred barrels of pork was by said Brown left in the possession of said Buttler by said Brown, subject to the order of said Holden, and the said Buttler, in writing, guaranteeing the delivery of said pork to said Holden, the plaintiff; that on the 11th day of April, 1865, the said Brown, under the direction of said Buttler, the defendant, delivered to said Holden, in the yard of said Buttler, the said seven hundred barrels of mess pork, so marked and described as aforesaid; that on the morning of the 12th day
200 of April, and while the plaintiff was draying the pork to the

Mississippi river for shipment, and after he had removed only sixteen barrels of the same, the said defendant compelled the teamsters to desist from removing the pork, and refused and still refuses to permit the remaining 684 barrels to be removed from his yard, although demand has been made by plaintiff for the same.

4th. And plaintiff alleges that said barrels of mess pork were not taken from him on the order or judgment of any court against him, nor under an execution or attachment against him or against his property.

5th. The only cause for detention of said property made known to plaintiff by desendant is, that he has been notified by Messrs. Isett & Brewster not to permit said property to be taken away from his premises.

6th. And so the said defendant wrongfully detains the 684 barrels of mess pork, to the damage of plaintiff two thousand dollars, and therefore he sues, &c., by

JACOB BUTLER.
Attorney for plaintiff.

201 I, Howard M. Holden, being duly sworn, say that I am the plaintiff in the above suit; that I have heard the foregoing petition read and know the contents thereof, and that the statements therein are true, as I verily believe.

(Signed) HOWARD M. HOLDEN.

[5 cts. U. S. stamp.]

Subscribed and sworn to by Howard M. Holden in my presence, and before me, this 13th day of April, A. D. 1865.

JOHN W. JAYNE,
Clerk of Dist. Court.
By HENRY JAYNE, *Deputy.*

In Muscatine County District Court, June term, 1865.

Copy of answer of Isett & Brewster, made parties defendant on their own application.

H. M. HOLDEN
vs.
S. O. BUTTLER and ISETT & BREWSTER.

1st. Come defendant, Isett & Brewster, parties under that name and firm, who have been made defendants herein on their own
202 application, and for answer to petition of plaintiff deny that he is the owner of and entitled to the immediate and present possession of the seven hundred barrels of mess pork described in his petition, and deny that the same was by the said defendant, S. O. Buttler, wrongfully detained from him, or that he has sustained any damage thereby.

2d. They further deny that said pork was of the value only of twenty-three dollars per barrel, as alleged by plaintiff, and aver that

the value of the same was much greater, to wit, twenty-seven dollars per barrel.

3d. They further deny that a valuable consideration was, in fact, as alleged, "in hand paid by plaintiff to said defendant, Buttler," and they say that such consideration, if any, moved from and was given by either the Washington Branch of the State Bank of Iowa, or the First National Bank of Washington, banking corporations, doing business in the town of Washington, State of Iowa, in the same building, and under the direction of the same officers; but by which of the two corporations these defendants are uninformed and
203 wholly ignorant; and they aver that no part of such alleged considerations moved from or was furnished by the said plaintiff.

4th. These defendants further answering, say that they have never seen said alledged receipt, but they have been informed and believe that an instrument of writing was executed by the said O. W. Brown to the said plaintiff, in relation to the said seven hundred barrels of mess pork, but whether the same was a warehouse receipt in fact, and what it contained, are unknown to these defendants, and they demand inspection of the same; but they deny that the said seven hundred barrels of mess pork, or any part thereof, was received by the said O. W. Brown, or was in the possession and custody or under the control of the said Brown; and they further deny that the said seven hundred barrels of pork, or any part thereof. was, on the 11th day of April, 1865, by the direction of defendant, Butler, [was] delivered by the said Brown to the said plaintiff.

5th. These defendants, further answering, say that said receipt, if any such were given, was merely colorable; that the said
204 O. W. Brown was not then nor has he since been a warehouse man, or the owner or occupant of a warehouse; that it was signed by the said O. W. Brown, then an employee of said Buttler, at the instance and request of said plaintiff; that the said Brown did not take, nor did he attempt to take, the said pork into his possession or custody, but the said seven hundred barrels were, and continued to remain, until the same was taken by the process of this court, on the premises, and in the actual custody of said Buttler, wholly undistinguishable in size, mark, manufacture, or otherwise, from other barrels of mess pork on said premises, at the date of said alleged receipt, and since said date.

6th. And for other and further answer, these defendants say that said alleged warehouse receipt, if the purport of the same is truly given in plaintiff's petition, is false and incorrect in this, that it acknowledges the receipt by the said O. W. Brown, of seven hundred barrels of mess pork, delivered to him by plaintiff on the sixth day of January, 1865, when in fact, if any part was or had then
205 been delivered to him, professedly by, or for the plaintiff, the same did not exceed six hundred barrels; and they further say, that at the time said receipt was made and delivered as alleged, said Butler did not have or possess any other or greater amount of mess pork than six hundred barrels. And these defendants further

say that the additional one hundred barrels of pork required to make the number up to seven hundred, were not then, at the date of said alleged receipt, in existence, and these defendants in nowise admitting any right in, or claim to, said seven hundred barrels of mess pork, on the part of said plaintiff, as against themselves, aver, as to so much of said mess pork, to wit, one hundred barrels, as at the date of said alledged receipt, was not in existence, he is wholly without right, and his said alleged receipt therefor is void, as against them.

7th. These defendants, further answering, say that plaintiff is not the real party in interest herein; that if any right or claim to, or property in, said mess pork, growing out of said alleged
206 receipt, the same is held and possessed by the Washington Branch of the State Bank of Iowa, or the First National Bank of Washington, corporations capable in law of suing and being sued, and not by plaintiff. These defendants are unable to say which of the two said banks is the real party in interest, for the reason, that both said banks were composed of the same persons, managed by the same officers, used the same business rooms, and kept their funds and papers in common, nor have these defendants sufficient information thereon to form a belief, but they aver that plaintiff was the cashier of both said banks; that one of said banks, defendants are unable to say which, discounted the four promissory notes of said Buttler, to wit, one note for $7,500; two notes for $5,000 each; and one for $393 75; all of which were dated January 6th, 1865, and payable ninety days thereafter; that the total amount of said notes was $17,893 75; that the amount actually received for the discount of the same was $17,138 75; the residue, of $755 40, being
207 retained and reserved by the bank so discounting the same; that the said notes were, at the instance and by the direction of the said plaintiff, made payable to his own order; that he was not made payer therein, at the request or for the accommodation of the said Buttler, or within the design or expectation of becoming endorser or surety on said notes for said Butler; and these defendants aver, that the said several promissory notes were, at the institution of this suit, held, owned, and possessed by one of the banks aforesaid, and not by the said plaintiff; that the said alleged warehouse receipt was given at the same time, and was part of the same transaction for which the said notes were given; that if of any validity, it was merely incident to, and meant and understood as a pledge or collateral security for and attaching to the said notes. And these defendants further say, that all the negotiations touching the said loan or transaction, growing out the same, including the said attached warehouse receipt, were, in fact and in truth, made with and performed by the said plaintiff, in his character and capa-
208 city as cashier aforesaid, and in no otherwise; wherefore they say that if any action is maintainable for the said seven hundred barrels of pork, the same should and ought to be brought by and in the name of the owner and holder of the notes aforesaid, of the said Buttler, which these defendants aver, is either the said

Washington Branch of the State Bank of Iowa, or the First National Bank of Washington aforesaid, and not by and in the name of the plaintiff herein.

8th. These defendants, further answering, say that if, as they aver, the said loan was made and the said notes discounted by the said Washington Branch of the State Bank of Iowa, the said loan is forfeited and void, and the said alleged warehouse receipt without any legal force or effect whatever, as against these defendants; for they say that the said Washington Branch of the State Bank of Iowa is and was at the time the said notes of the said Butler were discounted, and the said alleged warehouse receipt was given,

209 a branch of said State Bank of Iowa, organized and existing under and by virtue of, and its rights, powers, and duties defined, prescribed, and limited by an act of the general assembly of the State of Iowa, entitled "An act to incorporate the State Bank of Iowa," passed March 20th, 1858; that by the provisions of the said act, the said branch is expressly prohibited from taking, charging, or receiving on any loan or discount made, or upon any note or other evidence of debt discounted, or purchased by it, after the first day of January, 1863, any greater rate of interest than eight per centum per annum; that on the 6th day of January, 1865, the said Washington Branch of the State Bank of Iowa, represented by and acting through the said plaintiff, agreed to loan to the said defendant Butler, the sum of $17,500; that in pursuant to said agreement the said Buttler executed his three promissory notes of that date, to wit, one note for $7,500, and two notes for $5000 each, all of said notes being payable ninety days after said date; that at the instance, and by

210 the direction of said plaintiff, and not at the request or for the accommodation of said defendant, Buttler, the said plaintiff was made the payee of all said notes; that the notes aforesaid were thereupon discounted by the said Washington Branch, and the proceeds thereof given to and received by the said Butler; that in addition to the interest charged and reserved on and taken out said notes, and in pursuance of the agreement aforesaid, the said defendant Buttler executed and delivered at the same time the other three notes aforesaid were executed and delivered, one other promissory note for the sum of $393 75, and payable at the same time and in like manner to said plaintiff; that said last-mentioned note, was required and taken by the said Washington Branch of the State Bank of Iowa, professedly and ostensibly for and to cover such alleged charges growing out of and connected with the loan aforesaid, to wit: for extra commissions, exchange, and other of like import; that

211 all these pretended charges were fictitious, and meant and intended for extra and illegal interest, and to evade the provisions of said act incorporating the State Bank of Iowa, prohibiting the taking, charging, or receiving by any bank thereof any greater rate of interest than is by said act allowed. And these defendants aver, that the making and delivery by said Buttler, and discount of by said Washington Branch the promissory notes aforesaid, including the last-mentioned note for $393 75, and the making and delivery of

said alleged warehouse receipt, were all done at the same time, and were but one transaction; that the agreement for the said loan, between the said Buttler and the said Washington Branch, through its cashier, aforesaid, and the taking, charging, and receiving, in addition to the interest by the said act of incorporation allowed; the said note for $393 75, for the purposes aforesaid, was corrupt and usurious, and is a forfeiture of the said loan or debt; and
212 that the said alledged warehouse receipts, so required and taken by the said Washington branch as security for the said loan is invalid, and of no force or effect in law, as against these defendants.

9th. These defendants, further answering, say that if, as they aver, the said loan was made, and the said notes of the said Buttler, defendant herein, discounted by the said Washington Branch of the State Bank of Iowa, that the said alledged warehouse receipt is wholly void, and of no force and effect as against them, for they aver that the said Washington Branch of the State bank of Iowa is and was at the time said notes were made made and discounted, and the said alleged warehouse receipt was executed and delivered, a branch of the State Bank of Iowa, organized and existing under and by virtue of, and the rights, powers, and duties defined, prescribed, and limited by an act of the general assembly of the State of Iowa, entitled, an act to incorporate the State Bank of Iowa, passed
213 March 20th, 1858; that the said alledged warehouse receipt was contemporaneous with and demanded and accepted by the said Washington Branch as a pledge or security, for the loans and discounts aforesaid, and was the only security required and taken therefor; that the same is not "personal security," as defined and required, and as meant and understood by the said act of incorporation, and they aver that the taking of the said alledged warehouse receipt, as a pledge or security for the loans aforesaid, is in violation of the provisions of the said act of incorporation, and that the said warehouse receipt is as against them wholl invalid and without legal force or effect.

10th. And these defendants, further answering, say that if, as they aver, the said loan was made and the said notes of the said Butler discounted by the First National Band of Washington aforesaid, the said loan is illegal and in express violation of law, and the said warehouse receipts, taken as security therefor, is invalid and of no effect; for they aver that the said First National Bank is a corporation organized and existing under, and by virtue of, and its rights,
214 powers, and duties, defined and limited by a law of the United States, entitled an act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, approved June 3d, 1864; that said law, in section 29th thereof, provides in words and figures following, to wit:

29. And be it further enacted, That the total liabilities to any association of any person, or of any company, corporation, or firm, for money borrowed, including, in the liabilities of a company or firm,

the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in, provided that the discount of bona fide bills of exchange, drawn against actually existing values, and the discount of commercial or business paper, actually owned by the person or persons, corporation, or firm, negotiating the same, shall not be considered as money borrowed.

And these defendants aver, that the amount of the
215 capital stock of the said First National Bank actually paid in on the 6th day of January, 1865, when the aforesaid sum of $17,893 75 was by the said Buttler borrowed of said First National Bank, did not exceed the sum of $50,000; that the amount as loaned to him, the said Buttler, and the liabilities of the said Buttler to the said First National Bank of Washington, or the money so by him borrowed, greatly exceeded the one-tenth part of the amount of the capital stock of the First National Bank of Washington, then, when the said money was borrowed, actually paid in, and was, in fact, more than one-third of said capital stock then paid in. And these defendants further say, that the money so as aforesaid by the said Buttler borrowed of the First National Bank of Washington, was on the discount of the individual promissory notes of him, the said Buttler, and not on the discount of bills of exchange drawn against actually existing values, nor on the discount of commercial or business paper; wherefore these defendants say that the said loans so made to, and the said money so borrowed by, the said Buttler, and his liability therein, as aforesaid, was of an amount expressly pro-
216 hibited by the laws of the United States aforesaid; that the said liabilities cannot be enforced, or a judgment thereon recovered agaist the said Buttler, in a proper action of law; and they further say that the said alleged warehouse receipts, taken as security for the said liability of the said Buttler to the said First National Bank is for an amount of liability illegal and unrecoverable at law, is for values there when the said receipt was made, and taken, not actually existing, and that the same is void and of no effect, and vests no rights nor title to the said seven hundred barrels of pork in the said plaintiff, or the First National Bank, as against these defendants.

11th. And these defendants, further answering, say that the said seven hundred barrels of pork were, immediately after the delivery of the same to him by the plaintiff, under the writ of replevin issued herein, taken off and sold by the said Holden for the sum of $18,900, or twenty-seven dollars per barrel, and the proceeds thereof are in the hands of said Holden.

12th. And these defendants, further answering, say that they were, on the said 6th day of Janu'y, 1865, when the said alleged warehouse receipts is stated to have been given by the said Brown to
217 plaintiff, creditors to the said Buttler to a large amount, to wit, the sum of $15,000, if not more, and had been for a long time previously thereto; that after, as well as before the 6th day of Janu'y, they continued to make advances to the said Buttler, and on the

1st day of April, 1865, being anxious to have the indebtedness so due them by the said Buttler fully secured, the said Buttler executed to them a chattel mortgage to secure the sum of $10,000 on the seven hundred barrels of mess pork claimed by the plaintiff, and taken under the said writ of replevin, and delivered to him as aforesaid, which said mortgage was on the same day duly filed for record in the office of the recorder of deeds of Muscatine county, and was duly recorded in book F of chattels, folios 503 and 504, reference being had thereto the same will more fully and at large appear. And they further say, that their claim to, and lien on, the said seven hundred barrels of mess pork is of a higher character, and paramount to that growing out of alleged warehouse receipts.

13th. And these defendants, further answering, say that as ag'st them the said plaintiff is not the owner of the said seven hun-
218 dred barrels of mess pork and entitled to the immediate and present possession thereof; that they are, and were, at the institution of the suit, owners and holders of the same, and entitled to the possession thereof under the chattel mortgage, wherefore they ask for the return of said seven hundred barrels of mess pork, or judgment for the amount, as by the said chattel mortgage secured, to wit, $10,000, with interest from the time the same was taken under the writ of replevin herein.

WM. S. BRANNAN,
RICHMAN & CARSKADDEN,
Att'y for Defendants.

STATE OF IOWA, *Muscatine County, ss:*

Wm. C. Brewster, once of the firm of Isett & Brewster aforesaid, says he has heard the foregoing answer read, and that he knows the contents thereof, and that the matters and things therein stated are true, as he verily believes.

(Signed) WM. C. BREWSTER.

Sworn and subscribed before me this 19th day of June, 1865.

(Signed) JOHN W. JAYNE, *Clerk.*

Fees, $3 00.

219 JAMES W. FINLEY
vs.
THOMAS M. ISETT, WM. C. BREWSTER, and S. O. Butler. } 63. Ch'y.—May term, 1867.

WEDNESDAY, *May 22nd*, 1867.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that the said respondents, Thomas M. Isett and Wm. C. Brewster, partners, under the firm and style of Isett & Brewster, assign, without recourse, to the said complainant, within thirty days from the date of this decree, the two notes last maturing,

to wit, the note for ($2,000) two thousand dollars, dated March 16th, 1865, payable four years thereafter, to the order of said Isett & Brewster, and the note for two thousand dollars, ($2,000,) of date March 16th, 1865, and payable in like manner five years thereafter; and as to the remaining equities prayed for in said bill, the same be dismissed, and that each party pay his own costs herein.

The defendant prays an appeal which is allowed, and it is ordered that the clerk approve the appeal bond at any time within twenty days.

Entry—May term, 1866. June 12, 1866—"Continued by agreement."

UNITED STATES OF AMERICA, *District of Iowa:*

I, W. G. Woodward, clerk of the Circuit Court of the United States for the district of Iowa, do hereby certify that the foregoing pages of writing, from page 80 to page 219 inclusive, contain and are [are] a full, true, and complete transcript of the depositions filed in the cause of James W. Finley *v.* Isett, Brewster, and Butler, lately pending in the Circuit Court of the United States, district of Iowa, and now appealed to the Supreme Court of the United States, as the same now remain on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the said Circuit Court, at Des Moines, this 16th day of Sept., A. D. 1867.

[SEAL.] W. G. WOODWARD, *Clerk, &c.*

SUPREME COURT OF THE UNITED STATES.

No. 150.

DECEMBER TERM, 1868.

JAMES W. FINLEY, PLAINTIFF IN ERROR,

vs.

THOMAS M. ISETT, WILLIAM C. BREWSTER, AND SAGE O. BUTLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

Addition to record.

In the Circuit Court of the United States for the district of Iowa.

JAMES W. FINLEY
v.
THOMAS M. ISETT, WM. C. BREWSTER, SAGE O. BUTLER.

In the above-entitled cause it is agreed that the deposition of Thomas M. Isett may be taken before any notary public of the county of New York, in the State of New York, at his office in said county, (who is hereby agreed upon as a commissioner for that purpose,) on the 20th day of September, A. D. 1866, and on any day or days between the aforesaid date and the 26th day of September, A. D. 1866, upon the following interrogatories; said deposition to be used as evidence on the trial of the above cause, on the part of said defendants, Isett and Brewster. The notice required by law to be given to said James M. Finley, and the issuing a commission from the office of the clerk of said Circuit Court, are hereby waived. Said deposition to be subject to all just exceptions not herein waived.

Muscatine, Sept. 14th, A. D. 1866.

JACOB BUTLER, *Att'y for Plaintiff.*
RECHMAN & CARSKADDAN,
Att'y for Defendants.

2 *Deposition of Thomas M. Isett, taken before me, Frederick Hess, a commissioner duly appointed for that purpose by virtue of the annexed agreement.*

Thomas M. Isett, of lawful age, being by me first duly sworn, doth in answer to the following interrogatories depose and say:

1st interrogatory. What is your name, age, occupation and place of residence?

Answer. My name is Thomas M. Isett; age, 55 years; occupation, a banker; reside at present in the city of New York.

2d int'y. Do you know the parties to this suit?

Ans'r. I know the parties to this suit.

3d. int'y. Were you a member of the firm of Isett & Brewster? and if so, state if the said firm is now in existence; and if not, state when it ceased to exist, how long it existed, and what was its business.

Answer. I was a member of the firm of Isett & Brewster. Said firm is not in existence now. It ceased May 16, 1865. It existed for about 10 years, doing a banking business.

3 4th int. State if the said firm had any pecuniary transactions with the defendant, Butler, during the fall of 1864, and the winter following; and if so, the nature and amount of such transactions, and at whose instance and under what understanding, if any, the same originated.

Answer. We had pecuniary transactions with Butler during the fall of 1864 and the winter following; made large advances of money to him preparatory to packing pork, and purchased the same at his instance and with the understanding that he was to give us satisfactory security, from time to time, for such advances, as we might demand; I cannot now state the amount of money advanced, but it was large.

5th. int. State, if you know, for what purpose the defendant, Butler, executed and delivered to the said Isett & Brewster his notes for $2,000 each, payable in one, two, three, four, and five years, respectively, to the order of said Isett & Brewster, and a mortgage on his pork-house property in the city of Muscatine, all dated March 16, 1865. State fully all that you know respecting the purpose for which said securities were delivered to, and the character in which

4 they were held by, said firm, and the sources of your information.

Answer. I had but little conversation with Butler myself on this subject. I overheard a conversation between him and Brewster to the effect that the securities were placed in our hands for the purpose of securing us for all advances made to him; heard Butler state so himself. I never, for a moment, had any other understanding of the nature and purport of the securities than that they were placed in our hands to secure us for all advances made by us, and that we had no further interest in them.

6th int. State when you first knew of any claim being made by the complainant to the possession of, and beneficial interest in, said se-

curities adverse to that of Isett & Brewster, and how said claim was made.

Answer. I never heard of any claim adverse to that of Isett & Brewster, until, I think, some time in December last, when the complainant demanded the same; up to that time I never heard our right to the securities questioned from any source.

7th int. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Answer. On or about the middle of March, 1865, Butler's indebtedness to us was something over $11,000. The uncertainty and fluctuating character of the securities then placed in our hands, viz., the lien on 700 barrels of pork, subject to the claim, for a large amount, in favor of Holden, the emty tierces and the lard, and our indisposition to accept them as adequate securities, together with the Webster mortgage, all of which we refused to accept as such; then the securities in controversy were placed in our hands for the purpose of making our claim satisfactory to us. I never saw or heard of the letter of April 24th, addressed to Finley by Butler, until the December following, when Finley undertook to demand the securities. I would never have consented to hold the said securities simply in trust to inclose them, without recourse, and dispose of them in that way, as the whim and caprice of Mr. Butler might dictate, when, if our own claim had such precarious security, I knew at the same time, or supposed I knew, Butler had other debts, and this was an additioual reason why I wanted our claim fully and amply secured. The understanding with Butler was, that we were to exhaust all other securities placed in our hands before resorting to the notes and mortgage, and upon the payment of our claim we were to assign, without recourse, the securities to such person as [as] Butler might direct; he felt that this understanding of the matter required him to assist our claim in the 700 barrels of pork, when Holden replevied it. The truth of the matter is, these notes and mortgage were [not ?] a trust, and nothing more. The idea of binding ourselves to Butler for any such purpose is too absurd for belief.

THOS. M. ISETT.

Subscribed and sworn to before me, this 24th day of Sept., 1866.

FRED'K HESS,
Notary Public, N. Y. City.

STATE OF NEW YORK, *City and County of New York:*

I, Frederick Hess, a notary public, in and for said county, and a commissioner, as set forth in the annexed agreement, hereby certify that Thomas M. Isett was by me first solemnly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition subscribed by him, as above set forth, was reduced to

writing by myself in the presence of said witness; that the whole of said deposition was read over to said witness, and was by him subscribed and sworn to in my presence, and at the time and place in said agreement specified.

Witness my hand and seal of office, this 24th day of September, 1866.

[SEAL OF NOT. PUB.] FRED'K HESS,
Notary Public, N. Y. City.

CIRCUIT COURT OF THE UNITED STATES, *District of Iowa:*

Be it known that I, W. G. Woodward, clerk of the above-named Circuit Court, being informed that the deposition of Thomas M. Isett, heretofore taken and filed in my office, to be used in the said cause in equity of James W. Finley *vs.* Thos. M. Isett, Wm. B. Brewster, and Sage O. Butler, is not found in the printed copy of the transcript, heretofore made in my office, of the record and proceedings of the said cause, on an appeal therein to the Supreme Court of the United States, but appears to be omitted therefrom, do hereby certify that there is a deposition of Thomas M. Isett among the papers and in the testimony in the said cause, of which the foregoing seven pages are a full, true, and complete copy, as fully as the same remains on file in my office; and I do certify that if the same was omitted from the transcript of said cause heretofore made, it was omitted through a clerical error and an accidental oversight.

In testimony whereof I hereunto set my hand and affix the seal of the said Circuit Court at Des Moines, this 28th day of August, A. D. 1868.

[SEAL.] W. G. WOODWARD, *Clerk.*

Clerk's fee, $2 45.

Filed 7 Sep., 1868.

In Supreme Court United States, Dec. term, 1868.

Stipulation.

JAMES W. FINLEY
vs.
THOMAS M. ISETT, WM. C. BREWSTER, SAGE O. Butler.

Whereas, in the above-entitled cause, the deposition of Thos. M. Isett, a witness in said cause, and a party thereto, was accidentally omitted from the record by the clerk of the Circuit Court for the district of Iowa, from which said cause was appealed, so that the same was not included in the printed transcript of the record of said cause by the clerk of the court; and whereas the clerk of said circuit has discovered said omission, and certified to said deposition as a part of the record in said cause: Now, it is hereby agreed by the parties to said cause that said deposition shall be printed and become a part of said record, in the same manner as if said omission had not occurred.

Muscatine, Sept. 12, 1868.

WM. F. BBANNAN, and
RECHMAN & CARSKADDAN,
Att'ys for Deft's, Isett and Brewster.
ARTHUR W. WINDETT,
Att'y for Jas. W. Finley, Appellant.

Endorsed: Supreme Court U. S. James W. Finley *vs.* Thomas M. Isett *et al.*, No. 150. Stipulation. Filed Oct. 19th, 1868.

IN SUPREME COURT OF THE UNITED STATES.

JAMES W. FINLEY,
APPELLANT,

VS.

THOMAS M. ISETT,
WILLIAM C. BREWSTER,
SAGE O. BUTLER,
APPELLEES.

Appeal from Circuit Court for District of Iowa.

Argument of Wm. F. Brannan and Richman & Carskaddan,

FOR DEFENDANTS, ISETT AND BREWSTER.

MUSCATINE, IOWA:
B. F. NEIDIG, BOOK AND JOB PRINTER AND BINDER.
1869.

IN THE SUPREME COURT OF THE UNITED STATES.

JAMES W. FINLEY,
APPELLANT,
vs.
THOMAS M. ISETT,
WILLIAM C. BREWSTER,
SAGE O. BUTLER,
APPELLEES.

Appeal from the Circuit Court of the United States for the District of Iowa.

STATEMENT OF DEFENDANTS.

In the fall and winter of 1864-5, Sage O. Butler, one of the above named defendants, was extensively engaged in the purchasing of hogs and packing of pork, at the city of Muscatine, in the State of Iowa. Before commencing his operations, he made an arrangement with Isett and Brewster,—who were bankers and are the other defendants in this case—to advance money to him and honor the checks he might from time to time draw upon them in the prosecution of his said business, the said Butler to give them satisfactory security for such advances so to be made him under this arrangement. During the continuance of the packing season, Butler drew his checks upon them for a very large amount, the checks being duly honored.

During the latter part of the packing season of that year, pork products declined constantly and rapidly in value; and in view of this rapid and constant decline, and for the purpose of securing Isett and Brewster on the advances they had made to Butler, Butler and Brewster had a conference on the 16th day of March, 1865, at which time Butler gave to Brewster a lien upon 1,700 empty lard and ham tierces, upon 50 tierces of lard, and upon 700

barrels of pork, on which one H. M. Holden had a warehouse receipt to secure a claim of $17,500.00 maturing on the 6th and 9th days of April following; and stated he would look over his matters and see what he could do further in the way of security for them. A day or two afterward, he called at the office of Isett and Brewster and tendered them a package, containing among other things, a letter addressed by Thomas Webster to Mrs. Sage O. Butler, dated May 28th, 1857, and three notes dated May 1st, 1857, payable respectively in thirty-six, forty-two, and forty-eight months, to the order of Thomas Webster, and amounting in the aggregate to the sum of $7,003.72, and also a mortgage upon property in the city of Muscatine, known as "Butler's Pork House." These notes were indorsed by Thomas Webster without recourse, and were offered by Mr. Butler to Isett and Brewster as additional security. They declined to receive them as such security.

A few days afterwards, Butler brought them the securities in question, saying: You have now more securities than will be sufficient to protect your claim, and I wish you, when your claims are paid, to make such disposition of the collaterals as I may direct, either to hold them or to transfer them to other parties, and not to resort to these securities until you have exhausted the other securities you hold. This was agreed to by Isett and Brewster. No question was made of their right, title or interest in and to these notes and mortgage, until about December 12th, 1865, when the complainant presented an order dated at Chicago, December 9th, 1865, requiring Isett and Brewster to deliver them to the complainant, indorsed without recourse. The order was signed by Sage O. Butler, and stated that on the 24th day of April preceding he had written a letter to the complainant, in which he had stated that these securities were deposited with Isett and Brewster in trust, to indorse without recourse and deliver to such parties as he might designate, and that he now designated James W. Finley as the person to receive the same, and that said letter of April 24th had been submitted to and approved by Isett and Brewster, before the same was mailed.

Isett and Brewster refused to give up the securities upon this demand, and denied that the said letter of April 24th had ever been submitted to them, or that they had concurred in or assented to the statements it contained. At the date of these securities

and at the time when they were placed in the hands of Isett and Brewster, the balance owing to Isett and Brewster for and on account of the advances they had made to Butler, amounted, without interest, to the sum of $11,075.13. The other securities, viz: The lard yielded $2,134.62, the empty tierces $2,944.32, leaving a balance of $5,999.44 without computing interest. Nothing had then been or ever was realized by Isett and Brewster on the 700 barrels of pork.

Various letters, written by complainant, are incorporated in Brewster's answer. These letters were written in October, 1865, immediately after an interview with Brewster at Butler's house and in Butler's presence, in which the relation of Isett and Brewster to these securities was freely spoken of and fully understood, and their priorities in and to them to the extent of Isett and Brewster's claim (some $6,000,) were fully admitted and acquiesced in both by Butler and complainant. These letters were one of them written to Brewster, and the other to Butler. In one of these, dated October 20th, 1865, written to Butler, complainant states: "But as I understand you and Mr. Brewster, this mortgage was given with the intention of protecting my interests as well as Mr. B. When Mr. B.'s claim was satisfied the transfer of the property to be made to me." In another to Butler, of October 24th, stating: "I cannot control I. & B.'s mortgage. If I was in a situation I would advance their amount and take their mortgage, but it is not convenient to do so now, and therefore must let it rest."

The complainant charges in his bill that the securities in controversy were executed and delivered to Isett and Brewster, to be by them held in trust and assigned—without recourse—to complainant, when and as said Butler should direct.

The letter of Butler to Finley alleged to have been written April 24th, 1865, is claimed to prove the creation of the alleged trust. It is charged that this letter was read and approved by Isett and Brewster before it was sent to Finley. Isett and Brewster both deny that they received the securities upon the trusts and confidences alleged in the bill, and aver that they were given them as security for their own claim against Butler. They also deny that this letter of April 24th was ever read and approved by them, and they say they were entirely ignorant of the writing of

any such letter until the December following, when complainant undertook to demand the securities in his own right. They also say that, regarding their promise to Butler, not to resort to these securities until the others he had given them were exhausted, or proved unavailing and valueless, and on the payment of their claim, to transfer them as he might direct, as having connected with it a species of trust, they have spoken of these securities as being a trust matter.

There are various other points which will be referred to in the argument. The bill asks that Isett and Brewster be required to execute the trust it alleges, by assigning these securities to the complainant. The court below ordered that the two notes last maturing be assigned to the complainant, and dismissed the bill as to the other equities.

ARGUMENT.

The object of the bill in this case is, to compel Isett and Brewster to transfer to the complainant certain negotiable promissory notes, payable to their order, and secured by mortgage; which securities, the bill asserts, were placed in their hands, by the maker of them, Sage O. Butler, their co-defendant, on the express understanding and agreement, that they were to hold these securities in trust, for the sole use and benefit of the complainant, and to transfer them to him, when directed so to do, by Butler.

The answer of both Isett and Brewster are made under oath, as required by the bill, and fully deny all its material allegations. Butler, the other defendant, makes no appearance; but suffers a default to be entered against him. The established rule in chancery is, that the sworn answer of the defendant can only be overcome by the testimony of two witnesses, or by that of one witness, supported by strongly corroborating circumstances. There is but one witness to sustain the averments of this bill; and the testimony of that witness is so inconsistent with his own conduct, and is contradicted by so many of the essential circumstances bearing upon the case, as to greatly impair, if not wholly destroy, his general credibility.

Before proceeding to the consideration of the controverted points, we ask attention to some facts which are not disputed. It is not disputed that during the packing season of 1864-5, Isett

and Brewster, for the accommodation of Butler, made large pecuniary advances to him. That during this ~~term~~ time, they had no security whatever from Butler;—his pork products being shipped and consigned to his commission merchants, of whom the complainant seems to have been one. That on the 16th day of March, 1865, Brewster saw Butler, at Butler's request, at which time Butler spoke of the depreciation and declining tendency of pork products, and his desire to secure Isett and Brewster on the advances they had made to him. That certain securities were at that time given by Butler to Brewster—these securities being liens on a number of empty ham tierces, on a quantity of lard, and a warehouse receipt for 700 barrels of pork, on which one H. M. Holden, held a prior warehouse receipt for the sum of $17,500. That at this time, Butler's indebtedness to Isett and Brewster amounted to the sum of $11,078.13. That the securities in controversy, were made to Isett and Brewster directly. That they were delivered to them, that they bear the same date with the other securities given, viz: March 16th;—that after exhausting the other securities then given them by Butler, there remained a balance due them of about $6,000, exclusive of interest, which is still unpaid. That Butler's indebtedness to them was in fact greater than the sum of the securities in question, and that there was, therefore, a full and adequate consideration for them on the part of Isett and Brewster. That there was no connection whatever between the complainant and Isett and Brewster; that this alleged trust was not created at their request, nor at the request or with the consent of the complainant, nor even with his knowledge until weeks after its alleged creation.

These facts we regard as of very great weight and significance in the consideration of the questions involved in this cause. These securities were made in the name and passed into the possession of Isett & Brewster by the act of Butler, the maker of them. Isett & Brewster have not only the legal title, but the actual control of them. It is now sought to wrest from them the legal rights which these instruments expressly confer upon them, upon the pretense that their possession of them is but a bare, naked trust in behalf of Finley; and that their retention of them, after demand from Finley, is fraudulent and in violation of their trust. In other words, that they hold the securities in secret trust for

Finley. To accomplish this, and to impress upon these negotiable promissory notes and the mortgage securing them, a character and purpose in direct conflict with that manifested by the instruments themselves, requires very clear and conclusive evidence. For, even where fraud is charged, parol evidence is not regarded with favor, and the Court will not act upon it if it be not strong, irrefragable evidence: *Shelbourn vs Inchiquin*, 1 *Bro. C. C.* 341; *Marquis of Townshend vs Stangroom*, 6 *Vesy*, 334; *Miller vs Cotton*, 5 *Georgia*, 346; or if it be controverted or contradicted by other testimony: *Barrow vs Greenhough*, 3 *Vesey*, 154.

To support the proposition that these securities were given by Butler to Isett & Brewster, to be held by them in trust for Finley, and to be delivered to Finley, indorsed without recourse, when Butler should direct, a certain letter, copied at length in the bill, is introduced, and extraordinary prominence given to it by the learned counsel in his argument. This letter bears date, April 24th, 1865, and purports to have been written by Butler to Finley. It is charged that this letter was read by Isett & Brewster, and that they fully sanctioned its statements before it was forwarded to Finley at Chicago; and also that, at the same time, Butler delivered the securities in question to them. But all this is fully denied in the answers of both Isett and Brewster and controverted by them in their testimony. The learned counsel for appellant ~~calls~~ out a single sentence from the answer of Brewster, and separating it from its context, undertakes to pronounce the entire answer on this point "manifest evasion."

Recurring to the answer of Brewster, it will be seen that he says: "This defendant, further answering, says that the alleged letter of the said Butler to the complainant, dated at Muscatine, April 24, 1865, a copy of which letter the said bill purports to contain, was not, as alleged by said bill, read by, or the statements set forth therein made known to the said Isett & Brewster, before the same was, by the said Butler, sent to the complainant; and this defendant says that the first information or knowledge which the said Isett & Brewster, or either of them, had of the writing or sending of such letter, was through the letter of said Butler to the said Isett & Brewster, dated at Chicago, December 9th, 1865, and copied in said bill, or nearly eight months after the alleged date of said first named letter; that if, as charged, the said alleged letter was handed to the said Isett & Brewster before the same was sent, it was not read by them, or by either of them, nor were the alleged contents thereof communicated to them, or either of them, and that if any such letter were written and sent, they were entirely ignorant of it until the receipt, by this defendant, of the said letter of December 9th, 1865."—[Record, p. 15.]

This denial is full, clear, distinct and positive, without a shadow or trace of evasion lurking in or tainting it. As this letter is regarded as the creation of the trust which Finley is endeavoring to set up, and the foundation of his claim to these securities, we are disposed to examine it, and the circumstances both prior and subsequent to its date, with more of fulness and care than we think it deserves.

From this letter it appears that Butler had telegraphed Finley he would meet him at the Tremont House, and having failed to keep this appointment, the letter is written, giving the reasons for his non-appearance. It states that he has in the hands of Finley, and H. D. & Co., (Higgins, Dean & Co.,) $100,000 worth of pork products unsold, that he cannot make satisfactory propositions, and for the purpose of protecting Finley to some extent against hostile creditors, he executed his notes on the 16th of March, at one, two, three, four and five years, with interest, to order of Messrs. Isett & Brewster, and secured them by mortgage on his pork-house, and that Messrs. Isett & Brewster hold these notes in trust, and will at the proper time, transfer them with mortgage to parties I (he) may designate.

Let us compare the statements of this alleged letter with the averments in the bill. Complainant in his bill charges that on or about the 4th day of March, 1865, Butler was indebted to him in the sum of $25,000, and upwards. That in consideration of this indebtedness and for forbearance, Butler at that time promised to give Finley security on said indebtedness by way of mortgage on his pork-house, and that in the intended fulfilment of his promise, Butler, on the 16th day of the same month, executed the instruments in question, and deposited them with Isett & Brewster on the express understanding and agreement that they were to transfer these securities to Finley—without recourse—at Butler's request.

The first circumstance that challenges attention is the large discrepancy between the amount of the securities and the indebtedness it is alleged they were intended to secure. The indebtedness is stated to be at least $25,000, while the securities themselves are for a fraction less than one-half that amount, and in fact, of but two-fifths of it. It cannot, therefore, with any show of logic be claimed that the execution of securities for the sum of

$10,000, satisfies and fulfils a promise made to give security for the sum of $25,000. In the next place, the promise, if made at all, necessarily carried with it the understanding, that securities for Finley's benefit were to be made in Finley's name. These securities are not made in Finley's name, but in the name of Isett & Brewster, and are given to them, and Finley cannot get possession of them unless they are surrendered by Isett & Brewster, nor can he use them unless they transfer the legal title to him by indorsing them. It is not pretended that Finley was consulted or his assent obtained to the several amounts of these securities, or the length of time they are made to run. Although residing within five minutes by telegraph, and fifteen hours by railroad, of Muscatine, with letters constantly passing between Butler and Finley, in relation to their business transactions, Finley appears to have known nothing of the execution of these securities until informed by Butler's alleged letter of April 24th, or more than a month after the securities were executed. Finley was not consulted, nor was his assent in any manner sought, as to the propriety of interposing a trustee between himself and securities which he alleges were executed for his sole benefit.

These extrinsic circumstances, many of which are furnished by the complainant himself, tend very strongly to repel the claim which he sets up, under and through this alleged letter. And when we consider that the parties to this transaction were, all of them, men largely engaged in active business pursuits, having evidently a large share of business experience, and familiar with the forms and rules of business transactions, the conviction is almost irresistible against the claim or pretense now set up by Finley. When we look at the letter itself we find nothing to indicate with any certainty that Mr. Finley is intended to be the sole beneficiary of these securities. Butler says plainly, he cannot make satisfactory propositions; that the notes and mortgage were executed to protect Finley to *some extent* against hostile creditors, and that Isett & Brewster will at *proper time* transfer these instruments—without recourse—to "*parties*" Butler may designate. It will be here observed that he had other creditors beside Finley, and that when he speaks of a transfer of the securities he says the transfer will be made to "*parties*" he may designate. It is altogether improbable that by this letter Butler intended that Finley should

have the sole beneficial use of these securities; for, if such had been his intention, it is unreasonable to suppose that he would have spoken of the transfer to "parties" (using the word in plural,) instead of to Finley himself. It shows that there were other creditors present in the mind of Butler at the time the letter was written, and whose claims he regarded as of equal consideration with those of Finley. This is apparent when we call to mind his letter of October 31st, 1865, addressed to Finley, and Higgins, Dean & Co., in which letter he states that the claims of Finley, and Higgins, Dean & Co., against him are about equal, and he thinks it equitable and right, that these claims should be paid on the same footing. (See Record, page 62, Exhibit "B".) We shall have occasion to refer to this last named letter in the further progress of the argument.

Nor is this all. Butler, in his letter, says "that I. & B. will, *at proper time*, transfer the notes and mortgage to parties I may designate." Here he not only reserves to himself the right of a future designation of parties to be benefitted by these securities, but he postpones the transfer, until the time proper to make it. So far, then, from supporting the claim now set up by Finley, the letter is, in fact, confirmatory of the rights which Isett & Brewster claim on these securities. In their answers and testimony, they state that their agreement with Butler, respecting these securities, was this: That they were not to resort to them, until the other securities they had of him were exhausted, or proved unavailing or valueless; and that, on payment of their claim by Butler, they would hold the securities in trust, for such person as Butler might name, and transfer them as he might direct, &c. That Butler, when he wrote this letter, did not consider *that* the "proper time," to call upon Isett & Brewster to make a transfer of these securities, is evident from the letter itself. It is clear that there must then have been some difficulty or hindrance that interfered with, and prevented a transfer of these securities; otherwise, the letter would not have postponed their transfer to that indefinite and uncertain period, which is denominated "the proper time." The only hindrance, then, in in the way of a transfer, was the lien of Isett & Brewster for the money owing them by Butler. These words, "proper time," mean something; and they can only refer to some future event or contingency. What, then, were they intended to mean? In view of all the circumstances

of this, but one solution, at all satisfactory, can be given to this question, and that is:—when the claim of Isett & Brewster was paid, and their right to and interest in these securities had thereby become discharged and extinguished, that then "the proper time" to call upon them to make such transfer would have arrived; for Butler then would be in a position to designate the ultimate beneficiaries of these securities. It follows, then, and must follow, if we regard surrounding circumstances, as entitled to any consideration, or possessing any influence, that when this letter speaks of the transfer of these securities to be made "at the proper time," it means, and must mean, when the payment of their claim had relieved the securities of their lien; and when Butler would thus be at liberty to order their transfer to parties he might name. This is consistent with the language of the securities themselves, with the circumstances surrounding, and the conduct of the parties up to December 9th, 1865.

All the circumstances, both antecedent and subsequent to the date of this alleged letter, fully repel the claim to these securities, which the complainant advances. The letter itself, even by its own terms, furnishes a very precarious and unsubstantial support to it.

But it is said that these securities were placed in the hands of Isett & Brewster at the time this letter was written, and is therefore a cotemporaneous act, impressing the securities with the character applied to them by this alleged letter. If Isett & Brewster neither knew of, or sanctioned this letter, it is immaterial when they received the securities. They cannot, of course, be concluded by any instrument which they have neither signed nor authorized. The argument that the delivery of the securities was cotemporaneous with the writing of Butler's letter, is not only wholly unsupported by any evidence whatever, but is directly contradicted by the letter in question. This letter says that Isett & Brewster "*hold*" these securities. It speaks of their possession of them as a fact, existing at the time that Butler was engaged in writing it; and in the face of this clear and distinct language it uses with reference to the then possession of the securities, it is simply absurd to claim a title under a writing, and then dispute the plain import of its language. Of course, if Isett & Brewster had these securities when Butler was writing the let-

ter, as the letter itself says they had, they did not receive them after the letter was written. But this letter further states, that the mortgage had then been recorded. A copy of the mortgage is appended to the complainant's bill, marked "Exhibit A." Reference to the certificate of the County Recorder, annexed to this exhibit, shows that the mortgage was filed for record, April 4th, or twenty days before this letter was written; and it was doubtless so filed by Isett & Brewster, the grantees. It is contradicted, also, by another silent witness, which Finley, himself, offers. In his bill he claims, that Butler on the 9th day of December, designated him as the party to receive these instruments, and he introduces the letter of Butler of that date, in which Butler states that *he placed these securities in the hands of Isett & Brewster, on the 16th day of March, previous.* (See letter of Butler to Isett & Brewster.—Record, page 3.) Having adopted this letter, and based his subsequent action upon it, he cannot, consistently, with any known rule of law, question any of the statements contained in it. This is the only witness that speaks with any absolute certainty, as to the time when these securities were actually received by Isett & Brewster, and it fixes the time of such delivery nearly forty days anterior to the date of Butler's letter of April 24th. But aside from this letter of December 9th, if the delivery of the securities had been cotemporaneous with the writing of the letter of April 24th, preceding, that letter would have so stated, or there would have been some evidence to prove this important fact. There is none, however; but on the contrary, all the living witnesses that speak of the delivery of these securities, fix the time of such delivery antecedent to the 24th of April. Butler, in his testimony, says they were executed within a day or two after the 15th day of March. The word "*executed*" as applied to written instruments, implies *delivery* as well as the act of signing. *Weire vs City of Davenport*, 11 *Iowa*, *p.* 52. Higgins, complainant's witness, says they were in the possesssion of Isett & Brewster, April 18th.—(Record p 39.) Brewster says they were in his possession some two weeks after they were made, which would put it about the 1st of April. It is then so perfectly clear, that the delivery of these instruments to Isett & Brewster, was prior to the 24th of April, that we do not deem it necessary to call attention to other testimony bearing upon this point, more

especially as the argument of the learned counsel overlooks the statement, not only in the letter of April 24th, but the more specific statement in the letter of December 9th,—both of which letters are incorporated in his bill, and made exhibits in his testitimony.

The truth is, this letter of April 24th, by its own statements, originated in the accidental circumstance that Butler was two minutes too late to take the cars, and hence was unable to meet Finley, at the time and place he had appointed. Had he been in season for the cars, the letter would not have been written.

Having now shown that, as a matter of fact, the securities were, and had been in the possession of Isett & Brewster some considerable time before this letter was written, we will examine the answer of Brewster in reference to the charge that the delivery of these securities was cotemporaneous with this letter. The answer says that Isett & Brewster received them on the day of their date, or shortly thereafter. Now the material question and the particular inquiry is: Did Isett & Brewster know of this letter, and assent to its statements, as charged in the bill? Both, in their general answer, and the answers to the specific interrogatories of the bill, the denials on this point are full and explicit. This particular inquiry is answered; and it will be no objection to the answer to the particular inquiry, that the defendant has not answered it so particularly as to meet it in all its terms, provided it is with reference to the charge upon which the interrogatory is founded, and the object of the bill is fairly and substantially answered. *Daniels' Ch. Pr.*, 836.

We think that the object of the bill is fairly and substantially answered, and that is all we were required to do. This disposes of the appellant's argument, in so far as it is grounded on any assumed admission in the answer, that the securities were delivered to Isett & Brewster at the time this alleged letter was written.

Having shown, not only from the internal evidence furnished by the securities, but from extrinsic circumstances, of hardly less weight, that these securities are, in fact, what they declare themselves to be, in terms,—securities of which Isett & Brewster are the first beneficiaries, we will next contrast Finley's conduct and letters with his present pretensions.

The first interview between Finley and Brewster, was at the city of Chicago, in the month of May, 1865. These parties then met each other for the first time. Mr. Finley, in his testimony, says that this interview lasted but a short time, and that he cannot remember the details of the conversation. His statement, however, that at this interview, Brewster said: "They, (meaning, as he says he supposed, Brewster and Butler,) would be able to come over and settle all claims, and they would not do it with mortgages, but they would be able to do it with money," is, in view of the known pecuniary condition of Butler, at the time, so utterly improbable, that it stamps his whole testimony in that connection, with doubt and suspicion.

His next interview with Brewster was at the city of Muscatine, at the house, and in the presence of Butler, in the month of October, 1865. Finley, in his testimony, is prudently reticent with respect to the details of this interview. His testimony, however, as a witness in his own behalf, singularly confirms the claims of Isett & Brewster to these securities. In answer to questions propounded by his own counsel as to his object in going to Muscatine, and conferring with Butler and Brewster, he states his object was to get additional securities, and that these additional securities were additional security on the pork-house and the Holden bank claim.—(Record, page 47.) We need hardly remind the Court that this Holden bank claim, as it is termed, was a lien on 700 barrels of pork, which Butler had given to Isett & Brewster, on the 16th of March, previous, and about which a litigation was then pending in the Muscatine County District Court. No one pretends that this Holden bank claim was, in any manner, a trust for Finley's benefit. It was given expressly and directly to, and for the use of, Isett & Brewster. How then was he to become possessed of the Holden bank claim? The answer is obvious. In no other way than by the payment of the indebtedness which Butler owed to Isett & Brewster. He says, on the next line, he made this object known to Brewster and Butler. But he had no claim whatever on this Holden claim; and it is, therefore, clear that he was conscious that the Holden claim, and the notes and mortgage to Isett & Brewster, were parts of the same transaction, and held under the same right and title. He must, in any intelligible view of the matter, have so regarded them; otherwise,

why did he couple them together, and say that to obtain this Holden bank claim, was one of the objects that brought him to Muscatine? At this interview, called to enable Finley to consummate his object of getting securities on his claim, he makes no mention whatever of the letter of April 24th, 1865; and yet, during this interview, the relation of Isett & Brewster to these securities is fully spoken of, and their claim to priority fully understood. If Finley regarded himself as having any claim, then was the time, and that was the place, to assert it. There were present, Butler, the man who he now says had created a trust in these securities for his benefit; there was Brewster, the trustee, who was abusing his trust, and, in bad faith, seeking to appropriate its benefits to his own personal uses. No better opportunity could possibly have been afforded him, for he had there the culprit, and the testimony to convict him. Yet no allusion, whatever, is made to the alleged trust, nor any mention made of the letter of April 24th. When asked why he did not then claim these securities, under this letter, his answers are singularly repugnant. "One reason," he says, "I supposed Mr. Butler and Mr. Brewster, both understood the matter;" another is, "I had lost sight of this letter."—(Record, page 46-47.) At another place, he gives still another reason for his reticence in respect to this letter, "that Butler had requested it to be confidential." But would this request seal his lips in a company, made up solely of the person creating the trust, the person holding the trust, and the person to be benefitted by the trust? Some person once said, that he had learned to look with suspicion upon a man who gave a number of reasons, where one good reason would suffice. They contradicted and spoiled each other, he said, and showed that the person offering them was driven to excuses, rather than reasons. The variety of Finley's reasons illustrates this. They destroy each other. Why should he not freely communicate with the person who held a trust in his behalf, in relation to the subject matter of the trust? The injunction to keep the letter confidential, would no more apply to Brewster than it did to Butler; and this is more particularly true, when the alleged trustee, in the presence of all the parties to the alleged trust, claims the property as his own, and made for his benefit.

Finley, through his book-keeper, Rogers, endeavors to escape

from the dilemma, in which he involves himself by a mode as novel as it is unreasonable. Rogers says that this letter of April 24th was in his possession from the time it was received until his return from a trip to the East, about the 1st of November, 1865, —and that, after the 19th of October, it was in his private drawer, locked up with his papers.—(Record, page 44.) Let us even admit this most unlikely story, that Rogers took into his own possession, and deposited in his own private drawer, valuable papers belonging to his employer, and it does not help Finley. Rogers left Chicago for the East on the evening of the 19th of October, 1865. Finley returned home from Muscatine on the morning of that day.—(See his testimony.) Rogers was at home then, when Finley came to Muscatine, to look after and secure his indebtedness against Butler. Holding the relations to Finley and to Finley's business, which Rogers would make it appear he did, he must have known of Finley's intention to go to Muscatine, and the purpose Finley had in view in going there. The letter of April 24th, was then where Finley could "get a sight of it," and to say that Finley did not then, and frequently before, talk with Rogers about his business matters with Butler, would be to make Mr. Rogers a much more insignificant man, than either Mr. Finley or Mr. Rogers make him in their testimony. This whole pretence, that Finley had lost sight of the letter, and, therefore, did not remember it, appears to be a mere after-thought—a bald subterfuge—to screen Mr. Finley, and one by no means creditable to Mr. Finley's candor, or that of his clerk. It does not harmonize well with his statement, that he did not mention the letter, which he now says he had lost sight of, because this self-same letter requested that it be confidential. His excuses are as disingenuous as they are inconsistent.

Finley was a heavy creditor of Butler, looking after his interests as such. He was in Muscatine for two days. That he saw Butler frequently during that time, and that Butler then, if he had not done so previously, explained to him fully the nature and extent of the interest which Isett & Brewster held in these securities, is beyond all doubt; and that he informed Finley that their interest was precisely that they are now claiming, is equally certain. On Finley's return to Chicago, he addressed a letter, dated October 20th, 1865, to Butler, in which he states, "as I under-

stand you and Mr. Brewster, the mortgage was given with the intention of protecting my interests as well as Mr. B.'s, when Mr. B.'s claim was satisfied, the transfer of the property to be made to me, * * " (Record, pages 17 and 81.) This letter clearly and unequivocally acknowledges, in Isett & Brewster, that priority, to these securities, which he now assails and is endeavoring to claim for himself. And this understanding of the relative rights of himself and Isett & Brewster to these securities, he gets not from Brewster alone, but from Butler also, as is evident from this letter. On the 24th of the same month, he writes another letter to Butler. This letter acknowledges the receipt of a letter from Butler, of the day before, and says, "I cannot control I. & B. mortgage. If I was in a situation I would advance their amount and take the mortgage, *but it is not convenient to do so now*, and must therefore let it rest." This language is in remarkable contrast with his present pretensions.

Then he could not control the mortgage; what happened since that will warrant his doing so now? Then he was willing to advance the amount of their claim, to obtain these securities, but the money was not at his disposal. Now, without the advance of a single dollar, he is seeking to force from them the evidences of a debt still owing to them, on the pretence that they have always been his property. Then he fully acknowledged rights which he is now endeavoring to appropriate to himself. The man who is guilty of such glaring inconsistencies, and such evident bad faith, can have no standing in a court of equity. These letters are written to Butler —the man, who he says had created the trust he is seeking to establish; and they are written with reference to the subject matter of the alleged trust. There might be some excuse for practicing the arts of diplomacy in dealing with Isett & Brewster; for they and Finley held antangonistic positions with respect to these securities. The custom of the world might possibly warrant his using a language to them, that he did not hold to others in closer relations with him. But there could be no such purpose in his correspondence with Butler. These letters are evidently written with the freedom and in the spirit of full confidence, and have the evident marks of full knowledge touching the subjects to which they refer. They are not conversations imperfectly remembered, but the deliberate declarations of Mr. Finley, made in his own hand-writing,

over his own signature, to the very man who executed the securities, and with whom he was in the closest correspondence. Confronted, then, with his own letters, with witnesses of his own creation,—his rights and interests measured, as he himself measures them,—with what grace can he appeal to a court of conscience to decree him property, which he himself admits belongs to the person he is trying to take it from. And as a fitting climax to the incongruities and inconsistencies transparent in his conduct and testimony, he says that he did not, either in his conversation or correspondence referred to, intend to renounce, or give up the benefit of these securities under the trust respecting them under his agreement with Butler, and Butler's letter of April 24, 1865. Yet he tells this same Butler, the author of this alleged trust, in this same correspondence, that only on payment of Isett & Brewster's claim, the securities are to be transferred to him. That he cannot control Isett & Brewster's mortgage, but if he was in a situation, he would advance their amount and take the mortgage, but it is not convenient to do so now. Can anything illustrate more forcibly the utter insincerity of Finley, or the utter absence of anything like merit, equity, or good faith in his present claim to these securities?

To support his pretensions to these securities, and to establish the trust he alleges, Finley introduces Mr. S. O. Butler, one of the defendants, as his witness. Before proceeding to examine the testimony of this witness, we will remark that the record he has made for himself, in connection with this matter—his inconsistencies of conduct, and palpable contradictions—stamp his testimony as utterly unreliable,—as we will presently show: Mr. Butler states that the securities were originally made for the benefit of Finley, and deposited with Isett & Brewster, in trust for Finley,—and that Isett & Brewster received them and agreed to hold them in trust for Finley, and to deliver them to Finley, indorsed without recourse, when required to do so. This, to say the least of it, is both unusual and improbable, and bears a very suspicious complexion. It is to be remembered that Finley and Isett & Brewster were then strangers to each other. They had neither business relations, personal intercourse, nor was there a personal acquaintance between them. Finley does not ask or expect his securities to be made in this unbusinesslike and vicarious man-

ner. Neither Isett or Brewster ask Butler so to make them. It is not pretended that it was at their instance, or through any persuasion or artifice of theirs, that Butler was prevailed on to make these securities to them in secret trust for Finley. Butler, then, on his own motion, without suggestion from any other quarter, without any actual reason or apparent necessity for it, undertakes to secure Finley, by making the securities to persons who were strangers to Finley, and investing them with the legal title, and all the marks of absolute ownership to them. But Butler, in his testimony, appears to realize something of the situation in which he has placed himself, for when, on his direct examination, he is asked for whose benefit these securities were made, instead of answering with the frankness and openness of truth, he says: "I *understood* it, they were for the use of James W. Finley, of Chicago"—[Record, page 53.] Now, Mr. Butler is here asked as to a distinct fact, but he evades a direct and candid answer; and seeks shelter under that convenient and frequently unmeaning phrase, "I understood it." It was facts that were wanted—not the vague understanding, with which Mr. Butler chose to word his answer.

But grant that his testimony is all that it is claimed to be on this point; that the securities were intended for the sole benefit of Finley; that no other person was to have part or lot in them. How does this agree with the letter of April 24th, written weeks after the securities had been delivered to Isett & Brewster. The letter of April 24th is the first knowledge that Finley gets of the existence of these securities. We have examined this letter so fully, that we shall now only give it a passing remark. And this letter, so far from informing Mr. Finley that he is to be the sole beneficiary of the securities, tells him, when it says that the transfer will, at proper time, be made to *parties* Butler may designate; that others were to share the benefits as well as himself. If his intention was that Finley was to have the sole benefit of these securities, why does he not tell him so in plain terms? Why does he mask his meaning in the ambiguous and indefinite phraseology that marks the whole of this letter, if he had intended Finley, alone, to possess and ultimately control these securities? What sense or reason is there in telling Finley that Isett & Brewster will, at proper time, transfer these securities to parties he may

designate, if the use of them was, immediately on their execution, to enure to the sole benefit of Finley himself? To construe this letter as meaning that the securities were intended for the exclusive benefit of Finley, would be to disregard the plain import of the language it uses. And the letter, so far from corroborating the statement of Butler, that the securities were intended for Finley and no one else, if it proves anything at all, proves directly the contrary.

But the letter of Butler of October 31st, 1865, addressed to Finley, and Higgins, Dean & Co., is conclusive on this point, and ought to remove all doubt, if any could possibly exist. This letter was brought out by the complainant himself in his examination of Butler, as his witness. In this letter he says he divided his Chicago business between the complainant and Higgins, Dean & Co., that the final closing up of accounts showing him to be indebted to each in about an equal sum, he thinks "*it equitable and right that their claims should be paid on the same footing*, and proposes to execute an additional mortgage for $10,000 on the pork house property, and to give that, and the securities in controversy, to them jointly, on condition of their paying to Isett & Brewster the balance due them, $6,000. The propositions of this letter are as clear and emphatic a denial of the rights which Finley is seeking to claim under the letter of April 24th, as can well be considered. For this letter not only distinctly recognizes the right of Higgins, Dean & Co. to share in these securities, but it affirms the priority of Isett & Brewster by requiring the payment of their claim as a condition precedent to the transfer of the securities. If these were not the relative rights of the parties, then Butler stands tainted with bad faith and dishonesty, in undertaking to incumber this trust with a debt he himself owes the trustee; and then, on payment of this debt by the *cestui que trust*, requiring him to divide the trust property equally with a stranger to the trust. Certainly, his written designation in this letter, of Isett & Brewster as the first beneficiaries of these securities, and their division, on payment of Isett & Brewster's claim, between Finley and Higgins, Dean & Co., is utterly irreconcilable with his subsequent statement, that Finley was the first, and continued to be the only, beneficiary of these securities.

The statement that these securities were originally made and

held for Finley's benefit, is contradicted by Butler's letter of December 9th, 1865. In this letter, or order, Butler, referring to the letter of April 24th, says: "I *now* designate Mr. James W. Finley, of Chicago, as the person to receive these securities." This letter was written at Chicago, in the office, and under the direction of, Finley; and if, as is claimed, these securities were originally, and all the time, Finley's property, why does not this letter say so? If Isett & Brewster received these securities on the express understanding that they were to hold them for Finley, and to transfer them to Finley, why does not Butler tell them so in plain terms? If Finley was the designed and acknowledged beneficiary of these instruments, when they were made and delivered to Isett & Brewster, it is clear the letter would have so stated. The declaration of this letter of a then present designation of Finley, is utterly inconsistent with the subsequent statement that the securities were made, and all the time held for Finley's use. For if this had been so, and the securities were so held, we cannot for a moment suppose that so important a fact would have escaped their notice, or have been omitted in the letter.

We have thus Butler's letters to Finley, and to Finley and Higgins, Dean & Co., his verbal statements to Finley, as shown by Finley's letters to him, and his letter to Isett & Brewster, all, in flat contradiction of Butler's statement, as a witness, that these securities were always intended for the sole use and benefit of Finley. This is testimony which Butler himself furnishes. In addition to this, we have not only the evidence furnished by the instruments themselves, but the positive evidence of Brewster and of Isett.

Butler says he has no recollection of ever having recognized the right of any one to a lien on these securities, prior to that of Finley.—(Record, page 57.) This is very equivocal, or at least guarded language; and if Butler has no recollection on this point, it only shows that his recollection is very unsafe and very unreliable. Finley, himself, in his letters to Butler, in the month of October, 1865, says that Butler did recognize a priority in these securities in favor of Isett & Brewster, and Butler evidently admits it in his correspondence with Finley, as Finley's letter to him abundantly prove. Finley, in his letter of October 20th, 1865, tells Butler that he understands from him that the securities were made

for his own protection, as well as that of Isett & Brewster; when Isett & Brewster's debt was paid, the securities to be transferred to him. This letter was answered by Butler October 23d, as is evident from Finley's letter of October 24; and from this letter of October 24th, it is clear that Butler, in his letter of October 23d, not only distinctly recognized the priority of Isett & Brewster to these securities, but was proposing to give other parties a second mortgage on the pork house property, unless Finley would pay off the claim of Isett & Brewster. In this letter of Finley to Butler, Finley says: "Yours of 23d inst. received. In my letter "of October 20th, I have reference to mortgage of I. & B., and "not to the second mortgage. I thought it was understood be- "tween you and I, that I was to have the additional mortgage of "$10,000 on the property, whether I paid I. & B. mortgage or not. "*I did not think that had anything to do with the second mortgage.*" It is impossible to understand this letter as meaning anything else than this, that Butler refused to give Finley a second mortgage he had promised him, unless Finley would first pay off the claim of Isett & Brewster. If this is not an emphatic recognition by Butler of the priority of Isett & Brewster to these securities, we are at a loss to know in what manner, or by what language, a recognition can be shown. This is the testimony of Finley himself,—testimony that he will hardly question. And again, in his joint letter to Finley, and Higgins, Dean & Co., Butler proposes to give them a second mortgage, and a transfer of the securities in the hands of Isett & Brewster, on condition of their paying the amount due by him to Isett & Brewster. Here he makes the payment of the caim of Isett & Brewster a condition precedent to the transfer of these securities. Now if this is not a recognition of their priority to these securities, we cannot conceive what constitutes a recognition. In addition to this, we have the testimony of Brewster, that Butler in July, 1865, obtained his wife's release of dower, and had the title to the pork house examined, that these securities might be hypothecated, and the claim of Isett & Brewster paid. Mr. Butler is evidently a man of intelligence and experience; and when he says he has "no recollection" of having recognized a priority in Isett & Brewster to these securities, it looks very much like an attempt to make a bad memory an excuse for his own inconsistencies.

Butler, in his testimony, denies that he promised complainant a second mortgage, and says that complainant, when he speaks of a second mortgage in his letter, must have referred to a mortgage which Butler says he made in July, but destroyed immediately after. Here, again, he and complainant are in direct conflict with each other. Complainant in his testimony, says that his purpose in coming to Muscatine, was to obtain additional security on the pork house and the Holden bank claim. In his letter of October 24th, speaking of a second mortgage, says, "according to my un- "derstanding, you have no right to give that second mortgage to "other parties. It was made for my benefit, and I expect it in "fulfilment of your agreement."

Rogers, complainant's clerk, swears that on the 4th day of March, 1865, he demanded of Butler a mortgage in behalf of Finley; and that Butler then assured him, that *he did not owe a dollar in Muscatine*,—(See Record, page 42,) and yet Butler at this time owed Isett & Brewster fully as much as he did when these securities were made, as is evident from the account current appended to Brewster's answer, and which is admitted to be correct.

Butler, in his testimony, says, that the 700 barrels of pork, were replevied out of Brewster's hands. The record shows that the replevin suit was against Butler alone, and the pork replevied from his possession. Butler, in his testimony, says, that between the 10th and 15th of July, 1865, when at Chicago, he told Finley that he had better have the notes and mortgage in his own possession, and when he returned to Muscatine, he would send them to him; that on his return he asked ~~Butler~~ to give him the securities, endorsed without recourse, that he might send them to Finley; that Brewster replied: "I don't like Isett & Brewster's name to go out in "that way, as the notes might be offered for negotiation in Chicago "or Wall Street, and it would look as though we were hard up, "and obliged to sell our securities." And that on the 15th day of July, he proposed to make new securities for Finley, in the name of Audley G. Butler, (a son of Sage O. Butler,) in order to obviate this objection on the part of Isett & Brewster, and that about this time he became convinced that Brewster would not give up the securities, that he had nothing to do with offering the securities to the Merchant's Exchange, if they were offered at all.—(See Record, pages 56 and 57.)

We will now give Brewster's statement of what took place at this time:

"Some time in the 1st part of July, 1865, Mr. S. O. Butler being anxious to have his indebtedness to Isett & Brewster paid, inasmuch as I was cashier of the Merchants' Exchange, and it was very unpleasant for him to apply for discounts to the bank through me, while I held such an indebtedness against him, said he thought the bank would make an advance on that mortgage and notes, as they had surplus funds that they found no call for, and thought we had better try and see if we could not get the bank to make an advance sufficient to pay my claim. I told Mr. Butler that if we went before the board, we must do so with clean papers, and that the mortgage I had was not signed by his wife, and that I knew nothing about the title; that it would be necessary for him to get a release of dower from Mrs. Butler, and have the title examined. He said that he would do so. I then requested him to call upon Mr. Richman, so that the release might be properly drawn, and abstract of title made out. He said he had better take the abstract that I had, (being the abstract he gave me at the time he gave me the mortgage,) and have it brought down to date. The old abstract was down to about June, 1857. A day or two afterwards, Mr. Butler, having told me that the release of dower was perfected, and that Mr. Richman had examined title, I called upon Mr. Richman, who also told me such was the case. At the first meeting, I think, of the board of directors of the Merchants' Exchange, this mortgage and notes were offered as the basis of a loan, they being the collateral, Mr. Butler offered his own paper as the principal. (The abstract of title referred to is hereto attached, marked Exhibit "B," and is made a part of the answer of the witness.) The application was refused by the board, they declining to advance money upon mortgage security."—[Record, pp. 70, 71.]

The statements of these two parties are too positively made, and are too wide apart in many of their particulars, for the variance to be the result of accident, misconception, or forgetfulness. Butler says that between the 10th and 15th of July, he ordered these securities to go into Finley's possession, but that Brewster declined to endorse them without recourse, as it might affect the credit of Isett & Brewster if they were offered for negotiation; that he proposed a new mortgage, and that about this time he became convinced that Brewster did not intend to give up the securities, &c. Yet at this identical point of time, without any known reason, without suggestion from any quarter, he has his wife to sign and acknowledge an instrument releasing her dower in the mortgaged premises, and has an abstract of the title prepared, showing the incumbrances then on it. At the very time

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when, as he says, Brewster declined to transfer the securities at his request, when he wanted to substitute another mortgage for the one they had, and he had become convinced that Brewster did not intend to give up the securities, he endeavors by obtaining his wife's release of dower, to strengthen the title they wrongfully withhold, and to give additional value to the instrument he wishes cancelled. This exhibition of inconsistency, to call it by no harsher name, is not only palpable, but painful.

Brewster's version of this matter has on it all the marks of verity, and is undoubtedly true. He was cashier of the Merchants' Exchange, an institution from which Butler expected and sought pecuniary accommodations. Butler felt the embarrassment of asking advances through an officer who was his creditor to a large amount, and proposed that the securities in question be offered to that institution for discount. Brewster's answer was that "if we went before the board, we must do so with clean pa-"pers,—that the mortgage was not signed by his wife, nor was "any thing known about the title,—that it would be necessary for "him to get a release of dower from Mrs. Butler, and have the title examined." "Butler said he would do so." This was between the first and the middle of July. On the 14th day of July, 1865, Richman & Carskaddan make and present the result of their examination of the title. (See Record, p. 80.) On the 15th day of July, 1865, Mrs. Butler signs and acknowledges a release of dower to Isett & Brewster, on the pork house property, which is filed for record at 2½ o'clock, P. M., of that day. (See Exhibit to Complainant's Bill—Record, pp. 11, 12.) Yet Butler says that on this same 15th day of July, he wrote to Finley, proposing to execute a new mortgage in the name of his son, Audley G. Butler, as a substitute for the present mortgage. Both the release of dower and the abtract of title were made at the same time, were evidently intended for the same purpose, and on their completion taken to Brewster by Butler. Now Brewster's statement is intelligible and consistent. It shows an object and a purpose in having the dower released and the title examined, and the delivery to him of these papers confirms his truthfulness. Butler says he recollects a request from no one to have this release of dower executed, and that in relation to the examination of title, that it was not at Brewster's request, and by inference without his knowl-

edge; and that he "only requested Mr. Richman, if Mr. Kelly should call, to tell him exactly how the property stood." Of course, he means from this that the examination was intended solely for Mr. Kelly's information, as he says he knew all about the condition of the property himself. Yet who this Mr. Kelly is, or what interest he had in knowing "exactly how the property stood," Mr. Butler does not vouchsafe to tell. Brewster's statement is confirmed also by the testimony of Peter Jackson, then president of the bank, that Butler, during the summer of 1865, (he places it the latter part, but he is mistaken as to time,) sought a loan of the bank for $10,000, the exact amount of these securities. (Record, p. 64.) Acts are said to speak more strongly than words; and Mr. Butler's acts at this time, are a full answer to, and a complete refutation of, his testimony as a witness.

This is not all. Mr. Butler stands convicted not only by his acts in this connection, but by his testimony, as we shall soon see, when we come to speak of the Webster papers.

Mr. Butler is asked if, at the commencement of the packing season in the fall of 1865, he did not, in making application to the Merchants' Exchange National Bank for a loan, state to the directors that Isett & Brewster had a mortgage and were satisfied with that security. The question was a proper one as tending to impeach his statement that he had never recognized any right in Isett & Brewster to those securities; but Mr. Butler refused to answer the question. Butler's statements were made in the presence of a number of gentlemen, and it is probable that this circumstance suggested his refusal to answer. His silence is confession.

Jackson says that Butler, in applying for this loan, said he had settled up his Isett & Brewster matter all satisfactorily. Brewster Cook says the same, and further that he heard several previous conversations between Butler and Brewster, and the idea he got from all these conversations was, that Butler had given Isett & Brewster a mortgage on the pork house, to make them in any case perfectly secure. His indefiniteness as to particular times, is an argument in his favor, as it shows that there was no misunderstanding or difference between Butler and Isett & Brewster, as to the purpose of these securities, and that it was a matter too frequently talked of for him to fix any particular date.

It is impossible to examine the testimony of Butler in the light of his own conduct and acts, and weigh it with the testimony of all the other witnesses, without a deep and overwhelming sense of distrust His testimony is falsified by his own acts, and by the testimony of the complainant and his witnesses, and by the testimony of Isett and of Brewster and their witnesses. Where it does not equivocate, it is contradicted by others;—and where it does equivocate, it contradicts itself.

Brewster states substantially, that, at the interview between him and Butler, March 16th, 1865, after Butler had given him liens on the lard, ham tierces, and pork, Butler remarked that he would look over his matters and see what further he could do, in the way of securing Isett & Brewster,—that in a day or two afterwards, Butler called and gave to him a package, containing an account current between Thomas Webster and himself, three notes, a mortgage, and a letter dated May 28th, 1867.—[See Record, pages 76 and 77, for these papers.] These papers, Brewster says, he submitted to his attorney, Mr. Richman, who pronounced them worthless, that he saw Butler, and told him Mr. Richman's opinion, that Butler promised to give him another mortgage, and about two weeks after, Butler brought him the notes and mortgage in controversy, and remarked, "you have now more securities than "will be sufficient to protect your claim. I have made this mort- "gage an even $10,000 mortgage, and I wish, when your claims "are paid, to make such disposition of the collaterals as I may di- "rect, either to hold them, or to transfer them to other parties."

Butler says that these Webster papers were delivered to Isett & Brewster a long time after he had given them the securities in controversy; and he fixes the time that he got Richman to examine the title, as the time that these papers were left with Brewster. He says that, intending to take them to Mr. Richman, he showed them to Mr. Brewster, and explained the situation of them, and the notes have remained with him ever since; and that Webster was insane and died in the insane asylum, &c. If Butler's statement of the circumstances under which Brewster obtained possession of these papers is true, it simply contradicts his former statement that the examination was not made at Brewster's instance, but for Kelly's information. For if Brewster had nothing to do with the matter, why are the papers taken to him, their

situation explained, and the papers, all but the mortgage, left with him, instead of being taken to Richman? If Butler's last statement is true, the first is not; for the two are in direct antagonism to each other.

The record,—[Exhibit "A," page 77.]—makes some rather singular developments respecting these Webster notes. There are three of them, each dated May 1st, 1857, at thirty-six, forty-two, and forty-eight months, respectively, and amounting, in the aggregate, to the sum of $7,003.73. On the 28th of May, 1857, less than a month after they were made, Webster incloses them, with a letter to Mrs. Butler, also a mortgage. *On the 20th of June*, 1857, this mortgage is for the first time filed for record.—[See Exhibit "B," Record, page 79.] We have no comments to make on this, further than to say, that as the mortgage and notes had been returned to Butler, in fact, when this mortgage, which he says he knew was of no value, was filed for record, his attempt to encumber his property, in this way, and shield it from the claims of creditors, does not show to his advantage.

Both Isett and Brewster state that their agreement with Butler, not to resort to or enforce these securities, until the other securities they held were exhausted, or proved unavailing or valueless, or to dispose of them without his consent, and, on the payment of their claim, to transfer them to parties he might name, carried with it a moral trust, and they have frequently spoken of the securities as being a trust matter. Mr. Levi Higgins is mistaken in his recollection when he says that Brewster told him, on the 18th of April, 1865, that he did not take this mortgage on his own account, but in trust for another party. Mr. Higgins says he was particularly interested in the matter, and as a creditor of Butler to a very large amount, it is natural that he should be. Yet he made no inquiry as to the nature of the trust, or for whom it was held; nor can he recollect what further conversation they had, although they had considerable. This is not the kind of testimony by which to establish a specific trust. Brewster's testimony in answer to this, is, that he does not recollect any such conversation with Higgins, but he continues: "I will say that I never have "claimed these, or any of the securities, as exclusively Isett & "Brewster's. They were a trust matter, to be transferred by us, "when our claim was satisfied, as Butler might direct."

A copy of the pleadings in the replevin suit of Holden against Butler, in which Isett & Brewster appear as intervenors, is, by complainant, appended to and made part of the record. There is no allegation in the bill touching this suit, or making its proceedings proper evidence in the cause. It has nothing to do with this suit, and was very properly thrown out of consideration in the determination of it by the court below. Our answer to it will be very brief. In the first place, Isett & Brewster had a right to receive and avail themselves of any or all the securities that Butler placed in their hands as his creditors. Next, in asserting what they considered their legal rights in that suit, they were maintaining good faith with their agreement with Butler, which required them to exhaust and make available the other securities, in exoneration of the ones in controversy. And, lastly, it is not for complainant to seek any advantage in this cause, from the intervention of Isett & Brewster in that suit; for their intervention was more to his benefit than theirs, as, had they succeeded in that suit, it would have relieved the present securities of any claim on their part, and they would at once have assigned them to complainant, or any body else that Butler thought proper to designate. A full transcript of that suit would have shown that it was decided at the January term of the Muscatine County District Court, and that this suit was withheld until after such trial.

Isett and Brewster both say that they received these securities as security in part for the indebtedness that Butler then owed them, and that they did not consent, and would not have consented to hold them otherwise. The other securities were given March 16th, 1865. The fact that these securities were given to the same parties, and are made to bear the same date with the others, is a convincing proof that they were all intended to be parts of one and the same ~~particular affair~~, viz: to furnish Isett & Brewster with full, complete, and adequate security. For if they were designed for a different purpose, and as security for complainant, why are they not dated the day they were actually made, which it appears was some days after the 16th of March?

It may be admitted that Brewster, in general terms, said to other parties that this was a trust matter; and it does not affect Isett & Brewster's rights to these securities, nor would it be inconsistent with their answers, or their testimony. The rule of law upon this point is very clear.

"In order to fasten a trust upon property of any description "by means of parol declarations, the expressions used must "amount to a clear and explicit declaration of trust. They must "also point out with certainty, to the subject matter of the trust "and the person who is to take the beneficial interest in it, loose "and indefinite expressions, are insufficient for this purpose."—*Harrison vs McMenomy*, 2*d Edward's Ch.*, 251; *Slocum vs Marshall*, 2 *Wash. C. C.*, 398; *Mercer vs Stark*, 1 *Sm. & M., Ch.*, 479; *Dorsey vs Clarke*, 4 *H. & J.*, 551; *Chiles vs Woodson*, 2 *Bibb*, 71; *Noel vs Noel*, 1 *Iowa*, 423; *Corbett vs Smith*, 7 *Iowa*, 60.

None of these alleged admissions, as actually testified to, support the averments of the bill respecting them, or come within the requirements of the rule for establishing a trust by parol declarations. They do not point out with any certainty, the subject matter of the trust, and are altogether silent as to the person to be benefitted by it. They therefore really amount to nothing in themselves; and are not inconsistent either with the rights that Isett & Brewster claim, or with their answers.

Isett and Brewster both say in their answers and their testimony, that the rights they claim in these securities were never disputed or questioned until the month of December, 1865, or nearly nine months after they were made. There is not a shadow of testimony opposed to this. On the contrary, the testimony is overwhelming that the rights they now and have always claimed, have been repeatedly and unequivocally recognized and admitted, not only when all the parties were present, but by Finley and Butler, in the private and confidential intercourse and correspondence between them.

This case, take it altogether, is without a parallel in the history of litigation. A debtor calls upon a creditor, professes anxiety to fully secure him, makes and delivers to him negotiable promissory notes to this end, and secures them by a deed which is impressed with all the forms and solemnities of the law. The creditor places the deed upon record; and for a long time, his rights are fully recognized by all parties. Suddenly another creditor, who had never claimed other than a subordinate right in these securities, presents himself, and demands them as his property, claiming they were made and held for his sole benefit, and that

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the possession of the holder is but a mere trust in his behalf. The instruments themselves express no trust; and no declaration of trust has ever been made by, and never was asked of, the holders of them. They are but evidences of debt, and the maker of them was indebted to the holders in a larger sum than the securities call for. The bulk of that indebtedness still exists. The holders are not volunteers; but there is full consideration moving from the holders or payees to the maker. To establish this newly discovered trust, a writing made by Butler weeks after he had given the instruments to the persons whom the instruments themselves declare to be the owners of them—after he had parted with the possession of them—is produced by the claimant. This not being sufficient, Butler is himself introduced, *not in support of the instruments, but to impeach and contradict the title he himself had created.* Butler, who sought to deceive Finley as to his condition, when on the 4th of March, 1865, he assured Rogers, Finley's clerk, that he did not owe a dollar in Muscatine, when, at that time, he owed, and knew he owed Isett & Brewster, over $11,000. Butler, who, on the 15th of July, 1865, when, as he says, he became convinced that Brewster did not intend to give up these securities, obtains his wife's release of dower, and has the title to the property examined, in order that these securities may be hypothecated and money raised on them, and who, to cover this, proposed to Finley to execute new securities for the same sum, in the name of his son; Butler, who, in October, 1865, if he had not done so previously, told Finley that when Isett & Brewster's claim was paid, then his rights to these securities would arise; Butler, who at this time promised Finley a second mortgage on this property, and proposed to let another have it, unless he would pay Isett & Brewster and take an assignment of these securities from them; Butler, who in his letter of October 31st, 1865, tells Finley, and Higgins, Dean & Co., that Isett & Brewster are the first beneficiaries of these securities, and they can only derive the benefit of them by paying Isett & Brewster's claim; Butler, who says one thing at Muscatine, and its opposite at Chicago; Butler, who first offered Isett & Brewster the Webster notes and mortgage, which he knew were worthless, and then gave them these, on their refusal to accept the other; Butler, who attempts no explanation of his manifest and manifold inconsistencies; and whose inconsisten-

cies of conduct stand out in bold and striking contrast with his testimony; Butler is the instrument that Finley now uses to contradict the instruments he himself created, and to take from Isett & Brewster a title, which his own acts conferred upon them. A court of equity will be slow to act on the testimony of a man who comes before it as Butler does.

In Finley's letter to Butler, dated October 27th, 1865,—(Record, pages 19 and 82.)—occurs this significant passage:

"In disposing of your property, I shall rely upon your previous "promises. *If you cannot do anything more for me*, give me a "second [improperly printed "security" in Record,] mortgage."

"If you cannot do anything more for me," says Finley to Butler, "give me a second mortgage." There is no mystery in this language. Its meaning is fully developed in December following, when Finley gets Butler at Chicago, and he is made to sign the letter, which Rogers, Finley's clerk, writes, designating Finley as the person to receive these securities, and directing Isett & Brewster to deliver them up to him. If this was not the purpose it foreshadowed, then it is meaningless, and that such was its meaning and object, is apparent from subsequent events.

It is urged in the argument for appellant that the decree of the court below is incongruous and indefensible, in this, that it directs the assignment of the two notes last maturing to the complainant. The indebtedness owing to Isett & Brewster by Butler, we have already stated, amounts to $6,000, or the sum of the three notes first maturing, and is therefore fully secured by them. In view of this the answers state that—

"While the agreement of the said Isett & Brewster with the "said Butler authorizes the retention by them of all the securities "now held by them until the full payment of their said claim, they "are nevertheless willing to cancel, or to return to, or otherwise "dispose of, the last two notes maturing, of said securities, as the "said Butler may require."

It was strenuously insisted in the court below that complainant was at least entitled to those last two notes. We cared nothing for them; and the decree, in deference to the request of complainant's counsel, was put in the form which he now complains of; and the two notes accorded to him, which he claimed he was entitled to. He is not injured by the decree, and we believe the

rule is universal, that the decision of the court below will not be reversed, unless there is manifest error by which the appellant has been prejudiced. The decree in this case, if wrong in any technical light, gives the complainant more than he was entitled to, and hence he cannot complain of it.

Statements and conversations made when neither Isett nor Brewster was present, cannot, of course, affect them; and we have not, therefore, noticed any such in this argument.

If parol testimony can be introduced to contradict the written instruments, and give to them language they were not intended to use, such testimony must be very clear and convincing, or the bill will be dismissed.—*Adlington vs Cones*, 3 *Atk.*, 141: *Paine vs Hall*, 1 *Vesey*, 473. And if the testimony be inconsistent and conflicting, the Court will refuse the relief prayed.—*Grey vs Grey*, 2 *Sm.*, 597.

But we do not think that the testimony which sought to contradict the written instruments is competent, or ought to be admitted.

In the case of *Woollam vs Hearn*, 7 *Vesey*, 211, Sir William Grant, Master of the Rolls, says:

"The question is, whether this evidence is admissible, for "though read, it has been read without prejudice. The defendant "controverts it, supposing it can be received; but I own, my "opinion is, that if received, it will make out the plaintiff's case. " * * By the rule of law, independent of the statute, parol "evidence cannot be admitted to contradict a written agreement. "To admit it for the purpose of proving that the written agree-"ment does not contain the real agreement, would be the same as "receiving it for all purposes. It was for the purpose of shutting "out that inquiry, that the rule of law was adopted. Though "the written agreement does not contain the terms, it must, in "contemplation of law, be taken to contain the agreement, and as "furnishing better evidence than any parol can." * *
"But this evidence is offered not for the purpose of resisting, but "of obtaining, a decree, first to falsify the written agreement, and "then to substitute in its place, a parol agreement to be executed "by the Court. Thinking as I do, that the statutes have been "already too much broken in upon, by supposed equitable excep-"tions, I shall go no farther in giving effect to parol evidence,

"than I am bound to do by precedent. There is no case in which "the Court has gone the length now desired."

This is a leading case, and acknowledged authority. If parol evidence would not be allowed in that case to contradict the written agreement, although fraud was alleged in the bill, the same reason and the same rule would exclude it in this. Indeed the reasoning in that case bears with peculiar force upon the present case, and is especially applicable to it; for the purpose in both cases are similar—namely, to falsify the written agreement, and then to substitute a parol agreement, to be executed under the order of the court.

The Legislature of Iowa, admonished by the experience of the past two centuries, and for the purpose of avoiding the mischiefs that had sprung up under the construction given to the English Statute of Frauds, passed the following law many years ago:

"Declarations or creations of trusts or powers in relation to "real estate, must be executed in the same manner as deeds of "conveyance, but this provision does not apply to trusts resulting "from the operation or construction of law."—[Section 2213 of "the Revision of 1860.

And deeds of conveyance must be acknowledged before some officer authorized to take acknowledgments; and a certificate of such acknowledgment must be endorsed on the deed.

The Iowa statute differs materially from the English statute; for the English statute provides in the 7th section—

"That all declarations or creations of trusts or confidences "of any lands, tenements, or hereditaments, shall be manifested "and proved by some writing, signed by the party enabled by "law to declare such trusts," &c.

The English statute is by its terms limited to the actual transfer of the legal title to lands, tenements, &c., and hence it has been held that mortgages being a mere lien or security, are not embraced in its language, and do not fall within its operation.

The Iowa statute is much broader and more comprehensive in its provisions. It says "declarations or creations of trust *in rela-* "*tion* to real estate;" and thereby includes a defeasible trust security as well as an absolute conveyance in trust. For, the words "in relation to real estate," are broad enough to cover mortgages

on real estate, and mortgages on real estate clearly have relation to the realty on which they are liens. Full effect must be given to all the words in a statute, and we are bound to presume that the legislature in inserting these words, intended to give to the statute a larger scope than the English statute possesses, and to include within its provisions, objects that were outside of the English statute. Hence any right or interest in relation to real estate, which can form the subject matter of a trust, falls within the language of the statute, and being within its language, must be within its operation.—*Dartmouth College vs. Woodward*, 4*th Wheaton*, 637.

A mortgage on real estate is certainly something that has relation to real estate; for the real estate is the security of the mortgagee; and he can restrain the mortgagor from doing anything to the mortgaged property that will impair its value so as to endanger the security that rests on it.

These securities derive all their value from the mortgage that belongs to them. The promissory notes, disconnected from the mortgage, would not be worth the struggle. The instruments were made in Iowa, and the mortgaged property is in Iowa. The law of Iowa then is the law that is to govern. If this mortgage and these notes had their inception and creation for trust purposes, different from that disclosed in the answer, then either the trust itself must be created by deed, duly executed, or it must be declared by deed, duly executed. Neither has been done, for the executors of a mortgage to, and in the name of A, as his absolutely, will not be regarded as the creation of a trust in favor of B. For this, if a trust at all, is not a constructive trust, but an express trust; and constructive trusts, or those arise from the operation of law, are only exempted from the operation of the statute.

Mortgages which declare the trusts upon which they were created, or trust deeds as they are sometimes called, are by no means uncommon.

If we are right, in our construction of the law of Iowa, and the application of that law to the present case, it settles the question, against the complainant.

Finally, we think that the law of the case is with the defendants who have been brought up to this Court on the appeal. And the

evidence in the cause (even waiving the objections that were properly taken to those portions of it that are contradictory of the written instruments,) considered in connection with all its circumstances, fails to establish the trust alleged in the bill. All the presumptions of law, and all the relations and dealings between the parties, to these securities,—the maker and the holders, concur in supporting the instruments, and in pronouncing them what they declare themselves to be. Public policy and private right so concur, for if a debtor, who executes his commercial paper to a creditor, and secures this paper by mortgage, can be permitted, at the suggestion of another creditor, to repudiate his own solemn acts, and to falsify his own written obligations, no creditor is safe in accepting securities from his debtor; and commercial paper will have lost the sanctity that the law throws around it, and the integrity that commercial usage ascribes to it.

WM. F. BRANNAN,
RICHMAN & CARSKADDAN,

Counsel for Defendants, Isett & Brewster.

Supreme Court of the United States.

JAMES W. FINLEY,
Appellant.

vs.

THOMAS M. ISETT, *et al.*,
Appellees.

BRIEF FOR APPELLANT.

BY

ARTHUR W. WINDETT.
Of Counsel.

Supreme Court of the United States.

DECEMBER TERM A. D. 1868.

BRIEF FOR APPELLANT.

JAMES W. FINLEY,
vs.
WILLIAM C. BREWSTER, *et al.*

This bill was filed to enforce the execution of a trust.

The subject of the trust consists of certain securities, being five notes of Sage O. Butler, of Muscatine, Iowa, for $2,000 each, secured by a mortgage upon certain property situated in that city.

The transactions out of which the controversy grew, occurred in the winter and spring of 1865. They consisted, to begin with, of certain cash advances made by Finley, a commission merchant doing business at Chicago, to S. O. Butler, a packer at Muscatine. During the season of that year, Finley's claim for balance of advances made to Butler exceeded twenty-five thousand dollars. Butler had promised Finley to secure repayment, if and when the

result of the season's operation should leave him in Finley's debt. These promises were made in January, February, and in the early part of March of that year. The security promised to be given was to embrace the same property affected by these securities.

Early in March, 1865, Finley was becoming anxious about his claim, the securities for which, owing to the constant depreciation of pork products, were all the time growing smaller; and sent Rogers, his book-keeper, (Pr. Rec. 41,42.) to Muscatine to obtain the fulfilment of Butler's promise, and the execution by him of the promised securities. When applied to, Butler admitted, and renewed his promises; and it was then definitely settled that Butler should forthwith cause the securities to be prepared, executed, and recorded for Finley's benefit. The security contemplated was to be a mortgage upon Butler's pork-house property at Muscatine. This interview occurred on or about the fourth of March, 1865. Upon this Rogers returned to Chicago, leaving Butler to execute and forward the securities when ready.

Butler executed the five notes and mortgage now in question in intended fulfilment of his promise to Finley, and for his benefit. Before doing so, he had an interview with defendant Brewster, in which he explained to him the situation of his affairs, and his relations with Finley, his promise to secure him, and the plan he had in view for that purpose. The plan, in its detail, was to execute his five notes for $2,000 each, running 1, 2, 3, 4 and 5 years, with interest, etc., to and in the names of Isett & Brewster, of Muscatine, (of which firm Brewster was a member,) with a Mortgage securing them also in the names of Isett & Brewster, to hold for the use and benefit of Finley, and to transfer them to him when requested, or directed. This plan was sanctioned by Brewster, who consented, on behalf of the firm, to act in the manner contemplated by and necessary for the accomplishment of Butler's design.

It may be proper to state very briefly the nature of Butler's relations with Isett & Brewster at this time. They had also made advances to Butler for his packing operations. But at the time that Butler executed the securities in question, they held collaterals which more than covered their entire claim. A surplus of several

thousand dollars in value and amount of securities then held by them existed in Butler's favor. There was, therefore, no reason why they should exact or require additional security from Butler, or take any umbrage at the giving, by Butler, of these securities in favor of Finley, to whom Butler's obligations were large and of a peculiarly confidential character.

Having consulted with Brewster fully, and obtained his sanction to the plan, and having his consent to become trustee for Finley's benefit, Butler forthwith executed the mortgage and notes for $10,000, placed them on record, and delivered them to Brewster, at the same time showing and reading to him his own letter to Finley, dated April 24, 1865, acquainting Finley with what he had done. This letter, set out at large in the bill, (Pr. Rec. p.p. 2, 3,) was mailed to Finley on the day of its date, and was received by the latter within a day or two afterwards. As the letter becomes of the utmost importance in this cause, we again particularly refer to it.

Finley, upon being thus advised of what had been done at Muscatine, acquiesced in the course pursued. He accepted the securities as his own, and acted upon faith thereof. No farther demands were made by him upon Butler; but the claim on Butler thus partially secured was allowed to stand as it was, until the fall of 1865, when Finley demanded of Isett and Brewster the transfer of the mortgage and notes, presenting to them a written direction from S. O. Butler to that effect who peremptorily refused to make the transfer unless, Finley would first pay them a balance which they claimed that Butler owed them of about $6,000. In consequence of that refusal, the present bill was filed, charging the existence of the trust, and praying to have it enforced.

First—A trust as to these securities was duly constituted. Butler's letter of April 24, 1865, (Pr. Rec. 3) in connection with his testimony shows this in the plainest manner. There cannot be a doubt that he wrote and sent this letter to Finley at the time of its date. He swears so; (Pr. Rec. 53, 58, 59, 60, 61) Finley and Rogers both testifying that it was received by mail from him

at the time. (Pr. Rec. 44, 45, 46, 47, 48.) This letter was handed to Brewster, and read by him before it was sent. (Ev. Butler, Pr. Rec. 54.) "I took the letter to Brewster; told him I had written to Finley explaining how matters stood, and that I wanted him, Brewster, to read the letter before I sent it off, *that he might see if it was all right. He took the letter and read it,* and handed it back to me, replying: "Yes," or nodding assent. I then sealed the letter and put it in the post-office. (Pr. Rec. 54.) This letter as a contemporary act accompanying the execution and delivery to Brewster of the note and mortgage, is of the highest importance and conclusive of the fact. If this fact be proved, it created and conclusively proves the creation of the trust by the acts of Butler, and the assent and acceptance of its duties by Isett and Brewster. If it once existed, we are entitled to a decree for its execution in our favor by a transfer of the notes and mortgage which were the subject of that trust. There is no pretence that we have ever released or parted with our right to have it carried it out; so that the whole dispute is as to the naked fact whether, at first, a trust in our favor was constituted as to these securities, or whether they belonged to Isett and Brewster in their own right. This can be determined only by the evidence adduced. The letter of April 24, 1865, is not denied or questioned by Brewster. It is not denied that Butler wrote and sent it to Finley at its date, nor its reception by Finley; nor that Finley accepted and acted upon it, and solely on faith of it forbore for several months to present his claims on Butler, which were at that time very large, and for which these notes and mortgage constituted his sole security. We insist that the physical fact of the writing and sending of this letter is of the utmost significance. Still, more convincing when we show that it was made known to Isett and Brewster at the time, as the above extract from Butler's testimony shows.

The letter states that, "for the purpose of protecting you to some extent, * * I executed my notes on the 16th of March, * * to order of Messrs. Isett and Brewster, and secured the same by mortgage on my pork-house, and the mortgage was recorded. Messrs. Isett and Brewster hold these notes in trust, and will, at

the proper time, transfer them with mortgage without recourse. * * Keep the above confidential." (Pr. Rec. 3.)

As to Isett and Brewster's knowledge of this letter the proof is no less explicit. Butler, equally disinterested as between these claimants, not only testifies in the most unequivocal manner that Brewster knew of and approved this letter at the time it was written, and before it was sent, but states that all this was done in pursuance of a previous agreement for that purpose, not only with the complainant, Finley, but with Brewster himself. The simple facts of the case are so much stronger than any comments upon them can be, that we confine ourselves to a bare narration in the order of time of their occurrence. They explain the motives of the parties, and the *rationale* of their action in the most satisfactory manner. Butler, a pork-packer at Muscatine, had received advances from Finley, a commission merchant at Chicago, in the winter of 1864 and '65, of which a balance of $25,000 was unpaid and wholly unsecured, when, in March, 1865, the season's business was drawing to a close, with the prospect of an immediate and rapid depreciation of his stock then in his own and factor's hands. He had previously promised to secure Finley for this upon his pork-house, the property covered by these securities. Early in March, 1865, Finley had applied to him for the securities thus promised. Rogers, his book-keeper, went to Muscatine for that purpose. He says: "I made the demand for Finley, at Muscatine, on the afternoon of the 4th of March, 1865, on Mr. Butler I found that his pork product then on hand was held by other parties, and he could not give me any further security on it. * * Butler told me that he held himself bound in honor to protect Mr. Finley; he would make a mortgage on his pork-house property to secure him to that extent, the value of the pork-house and ground." (Ev. Rogers' Pr. Rec. 41, 42.) Finley testifies: "Previous to March, 1865, Butler promised me a mortgage on his pork-house to secure my claim of $25,000, and upwards." (Pr. Rec. 45.) Butler says: "That, apprehending at that time (middle of March, 1865,) that the season's business would turn out unfavorably, he had an interview with Brewster, to whom he was then owing about $11,000, and gave him what was then regarded by them both

(Pr. Rec. 54, Ev. Butler,) as ample security for what he was owing them. After that arrangement with Mr. Brewster was made, I informed him I was anxious to secure Mr. Finley by a mortgage on the pork-house to the amount of $10,000, and asked his permission to make the mortgage notes to the order of Messrs. Isett and Brewster to be transferred without recourse at a future date. Mr. Brewster consented to receive the notes in that way, and thought it was right that I should do so, considering my relations with Mr. Finley." (Ev. Butler, Pr. Rec. 54.) In accordance with this arrangement, approved and agreed to by Mr. Brewster, he consenting that his firm should assist in carrying it into effect, the securities in question were made and placed on record, April 4, 1865. (Pr. Rec. p. 11.) Butler's testimony on this subject, and as to the conversation with Brewster in March, 1865, is curiously corroborated by Mr. Brewster, as a witness for defendants in this case. He admits the interview; the reason for it as explained by Butler in his evidence, and agrees with him that provision was then made and security given for the payment of what Butler owed Isett and Brewster. (Ev. Brewster, Pr. Rec. 68.) Mr. Brewster, while saying nothing as to the arrangement thus proposed by Butler to be made for the benefit of Mr. Finley, does not contradict Butler's testimony upon that subject. If Butler' testimony was untrue, it is impossible to suppose for a moment that Brewster, the only witness that could expose its untruth, with so powerful a motive to do so, should not in terms deny Butler's statement. We ask your Honor to consider: Butler made a detailed statement of a conversation of a nature to afford the strongest corroboration of the appellant's case. What could more powerfully strengthen his case than to show not only an anterior necessity for giving this security, and Butler's positive promise to give it, but also to prove that the cause and motive, and the kind of securities were known to and approved of by Brewster before hand, and that he, with full knowledge of the facts, consented to become the trustee for the party designed to be benefited by those securities. If Butler's story as to this particular fact was untrue, the most imperious motives would compel Brewster to contradict

and refute it. Thus challenged, Brewster fails to say a word upon the subject. He does not contradict Butler in a single particular, but corroborates him in all. His silence is a plain admission that Butler told the truth.

Here, then, we have Brewster's admission, and Butler's direct and positive statement, that before these securities were prepared, Isett and Brewster, after being fully provided for, to the full extent of their own claim, agreed to become trustees in favor of James W. Finley of these securities. Butler's version of the matter carries on its face the marks of perfect candor and fairness. He was owing Isett and Brewster about $11,000, and to Finley more than twice as much. An honest man, anxious to do all in his power to secure debts which he could not then at once pay, would not naturally and spontaneously give the creditor whose claims were but of minor importance all his property trebly sufficient for that purpose, and to the exclusion of all others, and among them the appellant, whose claims to consideration were admitted by Mr. Brewster himself. (Pr. Rec. 54.) The entire record fails to show in Isett and Brewster any peculiar merit, much less one so transcendently great as to require that all of Butler's means should be devoted to their benefit, and that the entire claims and interests of all his other creditors should be made a holocaust in attestation of their pre-eminent equity. Yet, with the weight resting upon his case of Butler's evidence, of his own admission of its truth, and of this very great improbability in his own story, Mr. Brewster represents himself as calling for and receiving from Butler, without remonstrance, a surrender of all his property and resources to the exclusion of all others whose claims were of an equity at least equal to his own.

There is then in favor of Mr. Finley's claim an anterior probability, and equity; and against that of the defendants a very great degree of improbability, and an utter absence of merit, or equity. The claim of the defendants has no *raison d'etre*. It is an after-thought, wholly spurious and factitious. But this is not all the evidence showing the merits of the case as we claim it. Mr. Brewster, in the month of April (the same month that Butler wrote and showed him the letter above referred to), in a conversa-

tion with Mr. H. M. Holden, when interrogated by Holden as to the character in which Isett & Brewster held these Finley securities, disclaimed all ownership, and asserted that *they held them in trust for other parties.* (Ev. Holden Pr. Rec. 57.) This was not an inconsiderate statement. The occasion made him guarded, and deliberate. Holden, by suit against Isett & Brewster, was claiming 700 bbls. of pork under hypothecation by Butler for an advance of $17,000, which pork Isett and Brewster themselves claimed adversely to Holden, under a chattel mortgage from Butler, being part of the securities Butler gave him in March, 1865, at the time Mr. Brewster agreed to become trustee for Finley of these securities. At that time Brewster claimed a first and exclusive lien on that pork, and denied Holden's claim. This exclusive claim and denial of Holden's right was made by Isett & Brewster under oath, Mr. Brewster making oath to the facts. (Pr. Rec. 84–91.) This gave rise to the inquiry, natural on Holden's part, how they (Isett & Brewster) held these mortgage securities for $10,000. Butler owed them say about $11,000, and they were claiming $20,000 worth of pork, and other collaterals which realized them $5,000, everything that Butler owned, and, in addition held, as Holden learned, these securities. Brewster met Mr. Holden's inquiry by the explanation that while these securities were in their names, they were not for their benefit, but *they held them in trust for other parties.* This declaration of Brewster coupled with Butler's evidence, the writing, reading, and approval of the letter by Brewster, proves the trust in the clearest manner, and falsify their claim to absolute ownership. Both cannot be true.

In the same month of April Mr. Brewster made the same declaration to Levi Higgins, one of Butler's creditors, who held no security. Higgins says: "I had a conversation with Mr. Brewster on that subject (the $10,000 mortgage and notes); it was in his banking house at Muscatine; it was about the 18th of April, 1865; I learned of there being such a mortgage on record; I (thereupon) went to Mr. Brewster, and reminded him of a former conversation with me in which he stated that Butler did not owe Isett & Brewster, and I asked him why he took this

mortgage, on what account or ground; he stated that he *he did not take it on his own account,* BUT IN TRUST FOR ANOTHER PARTY. I was particularly interested; (in knowing about Butler's matters), *that impressed it in my mind.*" (Ev. Higgins, Pr. Rec. 39.) We cannot expect to add to the weight of this evidence by comments upon it, but suggest that if I. & B. held these securities for their own benefit, it was their duty to say so when thus inquired of about them by parties interested in knowing the truth. We submit that had that been the case, Mr. Brewster would have stated the fact. We cannot believe that he then made statements which he must have known to be false. Mr. Brewster, neither in his own answer nor in his testimony as witness, ventures to contradict Holden or Higgins. The utmost he does is to deny recollection of having made such statements. He then somewhat industriously attempts to give a different version of what was said from that given by both Higgins and Holden. A merely argumentative denial of this kind is not enough to overthrow the testimony of those two witnesses, neither of whom is interested. When the matter is so recent as this was, an answer of this sort is always treated as an evasion, which discredits the witness guilty of it, and as an admission by the party of the fact which he does not deny.

No less significant was the statement voluntarily made by Mr. Brewster, in May, 1865, to complainant. Mr. Finley testifies that Brewster then told him that Butler was owing them (I. & B.) but a small amount. He said: "*It would not be in the way of settling my claim with Butler;* that in a short time they would be able to settle all of Butler's debts." (Pr. Rec. 45.) If Isett and Brewster then held as they now claim these securities, subject to a claim of their own for $6,000, he could not, he would not have told Mr. Finley that their claim would not be in his way. They now place it in his way. They refuse to execute the trust in his favor unless he pay them the sum of $6,000. The contradiction between their present claim, and everything that was said and done by themselves no less than others in relation to these matters at the time, is perpetual and irreconcilable. All their own acts, and statements before, at the time of, and for some months subse-

quent to, the execution of these securities, and the letter of April 24, 1865, prove our case. These acts and statements are not, and cannot be explained away, or accounted for consistently with their present conduct.

On another occasion, in July, 1865, Mr. Brewster again admitted the existence of this trust. He said on that occasion that he should testify under oath in its support, and deny under oath the claim he now makes. Butler testifies to this conversation. (Pr. Rec. 56.) We again call attention to its terms in lieu of argument. He says: "In the summer (of 1865) I asked Mr. Brewster," if he was called as a witness in the Holden case, and were asked the question if he had not other securities by way of mortgage, what could he answer? He replied: "*Why, of course, if I would swear that it was a trust.*" We insist that in so swearing he would have sworn truly. If so, these securities belong to us. Mr. Brewster would have the Court believe that if that event had happened, and he had been placed as a witness on the stand, he would have corruptly sworn to a falsehood. Can any impeachment of his present testimony be so destructive to its credibility? Or can any refutation of this claim from us be necessary, when in order to make it, he would accuse himself of so great a crime? But we must go further than this. We must not only believe that Mr. Brewster would swear untruly, wilfully, with full knowledge of the fact; but that all these witnesses, Higgins, Holden, Butler, Butler's letter, Rogers, and Mr. Finley himself have all given false testimony. Not one of them is in any manner impeached. Not even the attempt to shake their credibility is made. How, then, can their testimony be discarded?

As accumulative proof, we refer to Butler's several statements, made in the summer and fall of 1865. As *res gestæ*, occurring near the time of these several statements by Brewster, we submit them as evidence. Thus he says: "Between the 10th and 15th of July, 1865, when at Chicago, I told Mr. Finley he had better have the note and mortgage in his own possession, and when I returned to Muscatine I would send them to him." (Ev. Butler, Pr. Rec. 55.) Conduct of this nature would have been sheer folly, if he knew that the note and mortgage belonged to Isett

and Brewster, and that Finley had no right to them, without first discharging a lien on them for $6,000. He adds: "On my return I asked Mr. Brewster to give me the notes endorsed without recourse, that I might send them, with the mortgage, to Mr. Finley." What was this demand but an assertion by Butler of the trust for Finley, originally declared by the letter of April 24th, and a denial that Isett and Brewster had any right to the securities? We shall see how Mr. Brewster regarded it. Mr. Brewster replied: "I don't like Isett and Brewster's name to go out in that way, as the notes might be offered for negotiation in Chicago, or Wall street, and it would look as though we were hard up, and obliged to sell our securities." (Pr. Rec. 55.) Not reflecting that payees of notes, endorsing them for discount, do not endorse them in that manner. The subterfuge was a futile one. But why make use of any subterfuge, when his own right to the notes, and a simple, direct denial of Mr. Finley's right to call for a transfer of them were a full answer to the demand? Nothing short of a written declaration of the trust we claim could be stronger proof of it than this conduct by Brewster. It was a full admission of our right, and a fatal confession that they had no title themselves. Butler proposed to make a new mortgage and notes in the place of the first, which he meant to have cancelled, thus obviating Mr. Brewster's objections. (Pr. Rec. 55,) Mr. Mr. Finley objected to any change being made. See his letter July 17, 1865, (Pr. Rec. 62,) containing his reasons, in which he says: "I would prefer to hold the mortgage as given to Isett and Brewster. * * If necessary to change the mortgage, make it to some other person for my benefit, or make it in my name. But I cannot see any reason why the notes and mortgages given to Isett and Butler cannot be transferred, and relieve them from all liability. I think it better to make no change from Isett and Brewster, other than I have named." This was a plain, unqualified assertion of right and ownership of Finley. It is inconceivable that he should have made it, if, as is said, he knew at the time that Isett and Brewster were entitled to a first lien on the securities; and that he had no right to a transfer until he had paid off their demand of $6,000.

The writing, reading, assent to, and mailing of the letter of April 24, 1865, being contemporaneous with the delivery by Butler of these securities to Isett and Brewster and forming part of the same transaction; the letter, notes and mortgage are to be taken and construed together as being virtually one instrument: *Miller vs. Thomas*, 14 *Ill.* 431; *Stacy vs. Kendall* 17 *Ill.* 467; *Esmay vs. Gorton* 18 *Ill.* 483; *Metro. Bk. vs. Godfrey* 23 *Ill.* 609–9. "As much so, indeed, as if they had been both written upon the same piece of paper, and expressly referring to each other." *Miller vs. Thomas*, 14 *Ill.* 431. That letter thereby became a part of the orginal contract, as much so, and in as effective a sense, in order to show its consideration and purpose, as if it had been written upon the same paper as the notes and mortgage to which it referred: *Russell vs. Southard*, 12 *How.* 139; *Miller vs. Thomas*, 14 *Ill.* 431.

It was consequently a declaration of the trust upon which these securities were received and held by Isett and Brewster, no less binding and operative as between the parties, than if the trust had been formally and expressly declared on the face of the notes and mortgage.

The trust is proved by the letter declaring that the notes and mortgage were in trust subject to the future action of Butler and Finley, and for the benefit of complainant as one of Butler's creditors, and not for the benefit of Isett and Brewster contingently or otherwise.

This letter brings the case within the technical definition of a trust. A trust is when the legal title is vested in one in confidence, that he will let the beneficiary take the profit, or benefit, and will hold subject, and convey in obedience, to his order: 2 *Bl. Com.* 328; 1 *Cruise Dig.* 281-7-8—top page.

Once a trust, always a trust is an axiom.

The assertion by Isett and Brewster of a right of ownership when they received these securities upon a trust inconsistent with such claim, makes the case one of an allegation and proof of fraud within the rule recognized in *Russell vs. Southard*, 12 *How.* 139. And parol evidence extrinsic to the original instrument, is admis-

sible for the purpose of showing its true character: *Russell vs. Southard—ubi supra.*

Butler's testimony is distinct and positive, that so far from these securities being given to Isett and Brewster as security, in part or otherwise for their claim, these securities were not mentioned between them until after their private relations had been fully discussed and provided for.

When that had been done, Butler opened the subject of his relations with complainant; spoke of his obligations to him, and of his own sense of those obligations, as binding him to secure his claim by all the means in his power. Brewster agreed with him in thinking so, and said he ought to do what he proposed, namely: secure Finley's claim upon the pork house property. Butler's plan was to give that security in the form of a mortgage and notes; and for reasons of convenience relating doubtless to the protection, use, and control of the property, and arising from the fact that Isett and Brewster resided at Muscatine, and Finley was a stranger, living some hundreds of miles away from the property, he proposed to make the notes and mortgage in the names of Isett and Brewster for Finley's benefit, to be held by them until required to transfer them to Finley, and then to be assigned by them to him without recourse.

Brewster, who gave his testimony after hearing Butler's statement, does not contradict him, but avoids doing so directly. He does not deny that after arranging the securities, which Butler says were set apart to them, and which as then estimated, considerably exceeded in amount their entire claim, besides that of Holden, the subject of Finley's claim was broached, the plan of securing it by these identical securities, to be held in the names of Isett & Brewster, approved by, and agreed to by Brewster; nor does he deny that Butler made, and delivered to him these securities in pursuance of that design.

The letter of April 24, 1865, is inconsistent with Isett & Brewster's claim. But Brewster denies that he read it, or knew of it until December, 1865, when the demand was made. Which witness is to be believed—Butler in bringing knowledge of that letter home to him at the time, and showing that Brewster had before-

hand agreed to act as such trustee; or Brewster in denying the fact. It will be borne in mind that Butler is disinterested. It is indifferent to him whether this question be decided in Brewster's favor, or in Finley's.

This makes it necessary to consider the relative claims to credibility of those witnesses; and in addition to what has been already said, we submit the following considerations as materially diminishing Mr. Brewster's title to implicit belief in his testimony:

The manifest evasiveness of his sworn answer, and testimony as a witness detracts from his trustworthiness as a witness.

An evasive answer is unworthy of credence: *Hull vs. Peer*, 27 *Ill.* 317.

An evasive, uncandid answer failing to meet the main facts, will be regarded with strong suspicion: *Baker vs. Baker*, 13 *Cal.* 87.

Thus Brewster, in his answer, says: "*That if as charged in bill, the said letter was handed to the said Isett and Brewster* before the same was sent, it was not read by them, or either of them." (Pr. Rec. 15.) Contrast this with the almost blunt frankness of of Butler: "I took the letter to Mr. Brewster; told him I had been unable to go to Chicago, and wanted to explain to Mr. Finley how matters stood; that I had written to him, and wanted him (Brewster) to read the letter before I sent it on, *that he might see if it was all right.* He took the letter, and read it, and then handed it back to me, with no other reply than 'Yes,' or a nod of assent." (Pr. Rec. 54.)

Mr. Brewster does not any where, either in his answer or testimony, deny that he had the interview with Butler as he describes it; nor that Butler made the explanation to him which he speaks of, but only says that *if the said letter* was handed to him as charged in the bill, *he did not read it.*" (Pr. Rec. 15.) Butler's statement as to what occurred at that interview, what occasioned it, and what was said and done by each party to it, is specific, detailed and altogether natural. If not true, it is *bien trouve.* If not true in each part, it was very easy for Mr. Brewster, as a witness, to contradict it, not only by a denial, but by showing its inconsistency with the real facts.

Again the bill charged the fact of Brewster having in April, 1865, stated to Mr. Higgins, in answer to Higgins' direct inquiry as to the character in which Isett and Brewster held this $10,000 mortgage; that they did not own that mortgage, but only held it in trust for another party. And the bill contained a specific interrogation on the subject. (Pr. Rec. 8.) Mr. Brewster's answer is: "And this defendant denies that he, *in express terms*, told said Higgins that the said Isett and Brewster simply held said securities in trust for other persons." (Pr. Rec. 22.) "This is guarded and peculiar language." Mr. J. Swayne. *Noonan vs. Lee*, 2 Black. 508.

He was further asked: "Whether at the same time, and as a contemporaneous act, Butler did not write and send to complainant said letter of April 24, 1865? And whether, before sending the same, Butler did not read it to Isett and Brewster, or hand the same to be read by them? (Pr. Rec. 7.) His answer to the first of those enquiries is: "That he does not know that Butler *wrote* (saying nothing about *sending* it), *such* a letter." To the second: "That *if* any *such* letter was handed to them, Isett and Brewster, he, Brewster, did not read it. (Pr. Rec. 26.) It made no difference who *wrote* the letter; if being written at all, it was adopted by Butler as his own, and by him *sent* to Finley. We submit these as sufficient proofs of the evasiveness of Mr. Brewster's answer, and as totally destructive of its credibility. "The defendant must answer directly, and without evasion; it must be positive, and not argumentative." 2 Dan. Ch. Pr. 833, *N. E. Bk. vs. Lewis*, 8 *Pick*, 113, 119; *Manning vs. Manning*, 8, Ala. 138; *Woods vs. Morrell*, J. C. R. 103. When asked if a particular letter was written, or deed executed—answer that no *such* letter was written, or *such* deed signed, held evasive: *Persey vs. Wright*, 31 Penn. 387.

And an answer that he has "no knowledge of the fact," is evasive: *Smith vs. Ladue*, 5, J. C. R. 247; *Robinson vs. Woodgate*, 3, Edw. Ch. 334. It eludes the enquiry which was intended to search the *memory*, the information and the *belief* of the party as to the fact.

But Mr. Brewster's testimony as a witness is directly and flatly

contradicted in several vital particulars. Thus he says that he proposed to Holden to transfer to him all the securities he held against Butler, including the seven hundred barrels of pork, the lard tierces, and barrels, on which he realized over $5,000, and these Finley securities, if he, Holden, would pay Isett and Brewster's claim of $11,000. (Pr. Rec. 75.) Holden denies that any such proposition was ever made to him; and says that if such proposition had been made by Brewster, he, Holden, would have accepted it. (Pr. Rec. 51, 52.) Brewster admitting the interview with Holden, as charged in the bill, gives a different version of what was said by him. He testifies that he told Mr. Holden they held the mortgage and notes for $10,000 in a different manner from their other securities, and upon a trust to transfer them, when paid their claim in full, as Butler might direct, instead of cancelling them. (Pr. Rec. 75.) This is negatived in the clearest and strongest manner by Holden, who states the direct opposite. That learning with some surprise that Isett and Brewster having a claim on Butler for only $11,000, and claiming to hold as security for that sum not only the seven hundred barrels of pork claimed by himself by hypothecation as security for $17,000, and the other collaterals, exceeding $5,000 in value, claimed in addition the $10,000 mortgage and notes, he made this apparent engrossing by Isett and Brewster of all Butler's means, the subject of enquiry and personal expostulation with Brewster. It struck him as extraordinary, and wanted it accounted for. Mr. Brewster's reply to him disabused his mind of its first impression, being that Isett and Brewster had not engrossed all of Butler's means or securities, notwithstanding the appearance to the contrary, that the $10,000 mortgage and notes were a *trust matter*, and were not taken on their own account, but on account of another party. This was an explicit denial of any such right or interest, whether priority or otherwise, as is now claimed. If not so, literally construed, Mr. Brewster's language must have been very artistically contrived so as to produce a false impression in the mind of Holden, by seeming to say one thing while he meant another not only quite different from it, but absolutely inconsistent with it. This species of prevarication is not the mark of a candid witness. The degree of credit to be

attached to a witness, studiously disingenuous, is all that the testimony of Mr. Brewster in this case is entitled to.

Again, how palpable is the contradiction afforded by the testimony of Mr. Higgins, to the evidence of Mr. Brewster. In the same month that Holden made the inquiry, and received the answer above referred to, and acting from precisely the same motives, Levi Higgins asked Mr. Brewster why Isett & Brewster took this mortgage—on what account or ground. Mr. Brewster stated that, *they did not take it on their own account*, but *in trust for other party*. (Pr. Rec. 49.) Mr. Brewster admits the interview with Higgins, which he speaks of, (Pr. Rec. 73), but says he told Higgins, "The securities were a trust matter, to be transferred by us when our claim was satisfied."—*Ibid.* Observe again, what moved Higgins to the enquiry was the *apparent* monopoly acquired and enjoyed by Isett & Brewster of all Butler's available means and property. Himself a large creditor, wholly unsecured, and Isett & Brewster, minor creditors, grasping and possessing all he had. Higgins expostulated with Isett & Brewster at the *apparent* injustice of their conduct, Mr. Brewster at once admitting the *appearance* of which Higgins complained, explained the fact to be otherwise; saying that they did not take the notes and mortgage in their own account, or for their own benefit, but on the account of another party, and for his benefit in *trust*. We are at a loss to know or imagine a more satisfactory or emphatic contradiction of the *apparent* fact, from their holding those securities made to them in their own name, than this statement of Mr. Brewster to Mr. Higgins. Mark the effect of it on Higgins' mind—precisely the same as on Mr. Holden's, showing if Mr. Brewster's version be accepted, and that of those witnesses rejected, the story which he now tells would have aggravated the grievance which they both complained of. It would have converted their impressions from the *apparent* fact into absolute certainty. It would have established with greater certainty the *apparent* import of these securities upon their face, that Isett & Brewster had indeed monopolized the whole of Butler's money and property. But, Brewster's statement, which he now denies, disavowed such to be the fact and asserted the contrary.

Mr. Brewster's answer to the 9 Cr. Int., (Dep. Pr. Rec. 75.) is but little calculated to strengthen his character as a candid witness. In view of his attitude and claims in the Holden suit, and of his present statements and position, so inconsistent, he was asked whether he did not claim in that case, the absolute ownership of the seven hundred barrels of pork, and if, as stated by him now, he held that property as collateral, why that fact was not averred in the pleadings. The stress of that question is apparent, when it is considered that Mr. Brewster, as the record shows, page 90, stated under oath, that under their chattel mortgage Isett & Brewster are entitled to an absolute *first* lien as against Holden, to said pork, which sold for $18,900, (Pr. Rec. 89), while in this case he swears that they were only entitled to a *second* lien on said property, Holden's lien being paramount. Instead of making any explanation of these statements, so directly in conflict with each other, his answer is: "I fought that case on strictly legal grounds." (Pr. Rec. 75.) If, as he swore in the Holden case, he had a first lien on the seven hundred barrels of pork, worth near $19,000, in addition to the securities, from which he realized $5,000, to secure his debt of $11,000, it strengthens the improbability of his present claim that the Finley securities for $10,000, were in addition, required by and given to him when these securities were placed in his hands.

It is not important whether he fought that case on valid legal grounds or not, but what *fact* did he allege and swear to, as the basis of his defence. That he asserted solemnly of record a fact, the very opposite of what he now asserts to have been the truth, is not calculated to inspire, or strengthen confidence in his veracity. His personal veracity is now the vital question. Whether, in opposition to a formidable array of witnesses and evidence, contradicting him, he is to be preferred and they all rejected, he wholly unsupported believed, and they each strongly corroborated, all disbelieved. The power of an oath over his conscience to wrest the truth from him against his supposed interest, is to be determined. The demonstrated fact that he once disregarded its high sanction, is decisive against him.

It will be remembered that the only direct evidence relied on

by the defendants is the testimony of Mr. Brewster. In aid of it, a pretended admission of complainant is invoked, it is true, of which hereafter. But the entire fabric of their case stands upon Brewster's denial of a trust for Finley's benefit and claim of a priority for Isett and Brewster before they were to be transferred. In this view of the case, all turns upon the veracity of his testimony. But how can that testimony be true, when he himself so frequently at the very time of the transaction deliberately and expressly stated the opposite of it to be the fact? If the plaintiffs' case stood solely upon the naked assertion of one witness alone, then Mr. Brewster's testimony might be allowed to be of equal weight. But if Mr. Brewster made the statements testified to by Holden, and again by Higgins, the preponderance is against him. Can it be doubted, or denied, that he made the statements to these witnesses which they speak of? Not consistently with the veracity of those witnesses. If they are to be believed, we must conclude that Brewster did say that Isett & Brewster did not hold these securities for their own benefit, but in trust for another party; that they did not take them on their own account, or benefit, but for the benefit of another. Because conceding that those witnesses spoke the truth, Mr. Brewster could not have used the language they both attribute to him against his own interest, depriving himself of the benefit of securities for his claim far exceeding it in value and amount, unless that had been the *fact*. Thus, Mr. Brewster, under oath, testifying alone in his own behalf, is not only contradicted by all the equities and probabilities of the case, the direct, positive testimony of Mr. Finley, and the letter of April 24, 1865, a witness, though dumb, yet as a *fact* existing in time irrefragable evidence of what was done, and of what existed at its date; but he is confronted with himself, by his own deliberate acts and words, as reported and verified by those two witnesses, whose veracity and title to belief, and to entire confidence, cannot be questioned. Then, we may enquire, (and it is Mr. Brewster who compels us to ask,) is Mr. Brewster, as an interested party, testifying without anything to corroborate him, in order to aggrandize his own interest at our expense, a better witness now than he was in April, 1865? Is his present memory

so clear as his certain knowledge then would have been? Are these cunning answers so convincing to the mind as his candid declarations to Holden and Higgins were? They believed what he said to them. Must we, can we, believe the very opposite coming now alone from him, without anything to explain their inconsistency, no pretence of error or mistake? Then he was disinterested, or rather acting against his *apparent* interest which he declared to be only apparent and unreal. Now he is deeply interested. If he can successfully establish his case, he will make or save over $6,000 by doing so. Then he was unstudied, candid, faithful to his trust—the trust Butler reposed in him, and which he voluntarily assumed. Now, his answers are evasive, his testimony crafty and artfully given to meet the stress of adverse proof. No, we submit that the Brewster of 1865 was the better witness, and must be believed rather than the other Brewster, who, violating a confidence which he invited and accepted, can only expect immunity from the consequences by trampling down the fact, and making, by dint of hardy denial what *was* to be what *was not*.

Second—The decree of the Circuit Court was wrong. It divided the subject of the trust. That subject was indivisable. As a trust it all belonged to us, if any part of it belonged to us. The decree gave us two of the notes—$4,000—the two of the series last maturing. If the evidence showed a trust in our favor as to these two notes, it showed the same trust, and a trust of the same absolute nature as to the three notes which first matured. The claim made is the same as to all the notes. The evidence in support of it is one and the same as to all. We have briefly pointed out the evidence in which that claim rests. If it supports the trust, that trust in its entirety and unity must be executed.

The same result follows, when we consider the defence made. It denies that a trust was constituted in our favor by the acts of Butler, and of Isett & Brewster in March and April, 1865. It claims that these securities were all of them made for the purpose of securing Isett & Brewster's balance. If that be the fact, they were entitled to hold all the notes until that balance should be paid, and to make use of all the notes, the entire mortgage, if necessary, by way of foreclosure and sale for that purpose.

If the trust, as we claim it, was proved as to the last notes, it was also proved as to the first, and the decree should have so declared. If not as to the first three notes, neither did it as to the two last; and these should not have been taken from the defendants. The decree is incongruous and indefensible in any light in which the subject can be viewed. We submit that the Court below (Judge Love) should have awarded the subject of contention to one or to the other party. If the defence be well founded, the whole was a pledge for the payment of their entire debt, and as a pledge, the subject was indivisible. The considerations governing the question are purely elementary. We submit that the attempt of the Court below to do what may have been felt was a sort of substantial justice, was an error for which the decree should be reversed in our favor.

But it is said, [Deft's Br. p. 31,] that this error of the Court below, was induced by our request; and "the decree awarding to complainant two of the notes, was put in the form complained of, because we contended for it in argument, and wished it to be so framed." In this counsel are mistaken. The fact is directly otherwise. The statement [unintentionally, doubtless,] of learned counsel is beyond the record, unwarranted by anything in it, and is in error. Indeed the clause in question was designed and inserted by defendants' counsel in framing the decree, in order to cut down the error of his Honor below, as far as possible, by diminishing to that extent the complainant's equity to a reversal upon appeal. The decision of Judge Love, as announced, was an absolute dismissal of the bill, denying the right to any relief. Counsel for the defendants waived the question as to these two notes, and *ex-industria* surrendered them, but without our consent, procurement, or authority. We interpose the most positive and direct statement to the contrary; and insist upon the error of the Court below, induced by the action of defendant's counsel, as showing conclusively that the decree was wrong and illogical. In finding the plaintiff entitled to these two notes, the Court found this fact alleged by us as decisive of the whole controversy; that a trust in our favor was created by the deposit or bailment of the notes, the agreement of Butler and Brewster, shown by

Butler's testimony, and the letter of April 24. That trust was an entirety. Either it existed, or it did not exist. If it existed at all, it must have been as Butler testified, as the letter imported, and as Mr. Brewster declared to Holden, Butler and Higgins. But that was of the nature and to the extent charged in the bill. That trust embraced the five notes, and the mortgage—the entire subject of the present controversy. The direct proof of the trust alleged must have been convincing in a high degree, to have compelled the Court, while denying us all we sought, to award us what the defence by pleading, proof, and argument strenuously denied that we were entitled to. Again, we repeat: Once a trust always a trust.

Again it is said, that only one witness sustains the bill in opposition to the sworn answers of the defendants; that consequently those answers must prevail.

But, in reply, we observe that only one defendant answers from his own knowledge—Isett had no personal knowledge of the transaction; that all his information was derived from Brewster; that his answer was only based upon that information, and his own belief of it; and that the rule requiring more than the testimony of one witness to overcome the denial of that answer, does not extend to Mr. Isett's answer. There is then only one answer, that of Mr. Brewster, which comes under that rule. But the rule in question does not apply to Mr. Brewster's answer, because it is contradicted by the whole body of plaintiff's proof, consisting in part of Brewster's own express declarations, which directly contradict his answer, so that the case is free from the operation of what is but a technical, or arbitrary rule; and the Court is at liberty to weigh the evidence upon the sole issue, which is: Was a trust in Finley's favor created by the transactions of March and April, 1865, as to these securities?

While Brewster is the only party who makes authoritative defence, he is the only witness for that defence who testifies directly in its support. On the other hand, Butler is not the only witness who contradicts the answer. Holden, Higgins, Finley, Rogers, the letter of April 24, '65—an indestructible fact, which makes controversy impossible, because it at once and necessarily estab-

lishes *that the bailment of the securities was made in trust*—all concur with him, and sustain him. Butler is unshaken. If he had been successfully assailed, the body of proof named would show that he is entitled to entire confidence.

Again it is said, [Brief 5,] that Butler's debt to Isett and Brewster when these securities were made, was largely in excess of the securities therefor, which they previously held; that consequently an adequate consideration existed for these securities moving from Isett and Brewster; that on the contrary no consideration was given for them by Finley; and that Finley was not a party to the agreement between Butler and Brewster in relation to their execution. It is represented [Brief 5], that these facts are not disputed by us. It is urged that they are of controlling force in determining the question in issue. We admit their significance, but deny their truth. The very opposite is the case.

For instance, so far from being a stranger to the transaction, Finley had pressed Butler for securities long before these were given. It was in pursuance of the promise made to Finley, when thus pressed, that Butler told Brewster that he was about to execute these securities, and proposed making them out in the name of Isett and Brewster, but to hold and transfer to Finley's benefit; which plan Brewster expressed approval of, and consented to aid Butler in carrying out. But for that promise, Mr. Brewster would never have had it in his power to make the claim which gives rise to this litigation. It was in faith of Butler's carrying out that promise, that Finley forbore to take other measures for his security. The moment these securities were executed and delivered to Mr. Brewster, Finley was formally apprised of what had been done, and assented to it. He considered the matter as safe as if the notes and mortgage had been in his own safe. This is the testimony of Rogers. It makes Finley a party to the transaction which constituted this trust, in his favor as effectually as if he had been personally present at the signing and delivery of the instruments.

As to the amount of securities previously held for their debt by Isett and Brewster, the error of the argument employed is equally great. Before a word was said to Brewster as to these

Finley securities, their claim was fully provided for. Certain collaterals, on which they afterwards realized $5,000, were given them; and in addition an assignment of the Holden pork, (700 barrels), which realized $17,000. Butler and Brewster agree in their statements that the pork was taken, subject to Holden's prior lien; but at that time, and for near a year afterwards, Isett and Brewster claimed an absolute first lien on that pork, and denied Holden's priority. Their claim of unqualified priority was made in the most formal and solemn manner, under oath as claimants, and as witnesses upon the stand. [Pr. Rec. 87, 91.] It was while making that claim, and speaking of their evidence in relation to it, that they told Butler that they should testify that these notes belonged to Finley and not to themselves; and that they held them in trust for him. [Ev. Holden Pr. Rec. 57, Higgins 39, Butler 56.]

It is urged that, to establish the trust charged in the bill, parol evidence is not admissible; or at least must be conclusive. [Brief p. 6.] And will not be acted upon if contradicted.—*Ibid.*

Scarce a word need be said in answer to this argument. If the Court believe the parol evidence, and disbelieve what contradicts it, the fact proved by it will be acted upon, and all the appropriate consequences of the conviction which it creates in the judicial mind will follow. Parol evidence is competent to establish the trust alleged and the fraud charged, consisting in the violation of that trust. The subject of this note, secured by a mortgage, is but a chattel interest in its nature, and is not to be treated as realty in any sense. There is, consequently, no formal objection to the evidence, owing to the statute of frauds, as this objection seems to imply. The only question is as to its cogency and effect. Does it prove the fact, *i. e.*, that Brewster, when the letter of April 24 was read to him, agreed to receive the securities for the purposes mentioned in that letter? Nor will the Court refuse to act upon evidence, both documentary and verbal, in itself competent, and which it judicially believes, simply because evidence of an opposing character is offered. If the contradicting evidence relied on by the defence be disbelieved by the Court, and regarded as untrue and insufficient for the purpose it is offered for, it will have no

effect upon the case. It is absurd to say that credible, veracious evidence can be neutralized simply by the offer of untrustworthy evidence. This would be to silence truth by mere falsehood, a conclusion abhorrent to the mind.

In an elaborate attempt to explain away the force of the letter of April 24, 1865, (Brief, pp. 7–13,) Counsel are compelled to admit its existence, and that it was written at the time charged in the bill. This admission is explicit, (p. 12.) It is impossible to escape the effect of that letter as admitted, incontestible fact. Besides observing that Brewster does not deny the writing of the letter, or his interview with Butler, when it was read to him April 24, 1865, but that he expressly admits the interview with Butler, when it was agreed (middle of March, 1865) that the securities for Finley's benefit should be made in Isett & Brewster's name to be held as a trust simply; and being relieved from all necessity for recalling to the attention of your Honors, the evidence which establishes those facts; we shall only point for a moment to the ingenious attempts of learned Counsel to explain away the import which this letter stamps upon the whole transaction. Thus, it is said, that the letter and securities were not parts of the same transaction as stated in the bill, and, as we contend, because the securities were dated March 16, 1865, and the letter was written on the 24th of the next month. We submit that it makes no difference what the comparative dates of the securities and letter are. It is the delivery, by Butler, of those securities to Brewster on the 24th of April, at the time he read the letter to him, and mailed it to Finley, that makes the letter, and the securities to which it refers, in form and technical effect, as well as substantially, one transaction of which they are the several parts, yet to be construed and read as if all written upon one sheet of paper, although they bear different dates. *Thompson vs. McClenahan*, 17 *S. & R.* 110. *Gammon vs. Freeman*, 31 *Maine* 243. *Stacy vs. Randall*, 17 *Ills.* 468, *express.* Butler's testimony is criticised because he said the notes and mortgage were *executed* near the middle of March. *Weine vs. Davenport*, 11 *Iowa* 52, is cited to show that *execution* implies delivery. The authority of a court, not inferior to that of Iowa, has determined that execution means *signing* and not the *delivery* of instru-

ments. *Stuart vs. Dutton,* 39 *Ills.* 93. The securities, though dated March 16, 1865, were not then delivered to Brewster, the mortgage was not acknowledged till April 3, 1865. Brewster admits that he did not receive them till several weeks after their date. (Pr. Rec. 11.) It was about the 18th of April that Brewster informed Higgins, who had learned that the mortgage was on record, that it was a trust matter which they held, not on their own account, but for another party. (Pr. Rec. 39, Dep. Higgins.)

It is insisted that parol evidence to establish the trust in question is inadmissable. The Iowa Statute of frauds, and other authorities, are referred to in support of this objection. But a single consideration suffices to dispose of this argument. The subject of this trust consists of a chattel interest exclusively. The notes, and the equitable ownership of them, which we allege are chattels. Even if savoring of the realty, parol proof would be competent to show the fraud of the defendants in violating a trust the duties of which they had assumed. By such assumption, they had acquired possession of these securities. Their present claim of absolute ownership, and refusal to execute the trust, was a fraud which may be shown by parol. *Russell vs. Southard,* 12 *How.* 131.

Third—It remains to consider how the evidence presented is met. The defence denies the trust. It is alleged as the basis of that defence, that Mr. Finley, in October, 1865, six months after the trust was constituted, made an admission that Isett and Brewster were entitled to a first lien to the exclusion of himself. It is insisted that this admission, being inconsistent with his present claim, is conclusive upon him.

It appears that during the summer of 1865, Brewster first began to show unwillingness to transfer the securities to Finley when requested to do so. His excuse for that unwillingness (hardly amounting, at first, to a distinct refusal) was that if the notes should go out with their names upon them (*without recourse,*) it might compromise the credit of his firm. *People might think that Isett and Brewster were hard up and forced to sell their securities.* (Ev. Butler, Pr. Rec., p. 55.) The disingenuousness of this excuse will be apparent when it is remembered that their firm had gone

out of business, having transferred their business to their successors; and that the assignment of the notes, *without recourse*, would indicate that the transaction was gratuitous and voluntary on their part, and not compulsory. Securities of this description, transferred for value as a means of raising money, are not assigned *without recourse* in the common course of business. The natural inference which would have been drawn from their qualified assignment would have been directly the opposite of what Brewster said he apprehended. If, when this request to make the transfer to Finley was made, (July, 1865,) Isett and Brewster had been entitled to a first lien, exclusive of Finley, Brewster would have said so. That he gave what, it is manifest, was a mere excuse, wholly destitute of color or plausibility, instead of what, if true, would have been an unanswerable reason, must be taken as conclusive of its falsity. It is incredible that a man of business like Mr. Brewster, an experienced banker, should have been silent as to his right of priority when that demand was made upon him, and by giving such an excuse for his conduct as he did, should have admitted the justice of that demand. Finley had no right to make that demand, unless, as he now claims, he was himself entitled to an unconditional priority. This evasive conduct of Mr. Brewster is now easily understood. The chances of success in the litigation with Holden for the pork, a litigation caused by Brewster's claim of priority to that property, it would appear, were growing doubtful in Mr. Brewster's mind. Though beaten in that suit, if he could hold the Finley securities, his debt would be covered. If they were transferred unconditionally to Finley, he would suffer a loss of $6,000 for want of security. The design of wresting these Finley securities from their proper purpose then gradually grew up in his mind. The means of making success certain were to be sought in a dexterous manipulation of circumstances, facts, and of the parties. First, the trust was to be gradually changed, Isett and Brewster apparent legal holders on the face of the instrument, holding them in trust, were to become *cestuis-que-trustent;* Finley, from having a priority, was to have a secondary interest. There being, as he supposed, little or no formal evidence of the trust as originally created, if, in the course of conversation,

or by letter written in the hurry of business, admissions could be obtained favorable to the new hypothesis, success would be assured. At least with them, address and hardihood and the chances of a law suit would all be in its favor. By Mr. Brewster's finesse, an unguarded admission of Isett and Brewster's priority was sought from Mr. Finley. The proofs of that admission are now flourished in the face of the Court, and they constitute the sole ground of defence. If such admission was ever made, (which we deny,) it would not be conclusive. It is explained, and falsified, consequently it can have no effect upon Mr. Finley's rights. The explanation is twofold; what is construed into an admission was said and done through misapprehension. It was not meant as now construed. Mr. Finley was *surprised* through the address of his wily antagonists. If he made any admission, it is shown to a demonstration to have been of what was not true in point of fact.

In examining the argument on which defendants rest this part of their case, we must not lose sight of certain facts which are clearly established. The interviews between Butler and Brewster, in March; the provision then made for Isett & Brewster's claims; the mention to Brewster of Butler's relations to Finley, and his obligation and purpose to secure his claim in part and to the extent of his means; and Mr. Brewster's agreement that his firm should act the part of trustees. The way was made clear for Mr. Finley's interests by previous securities being given to Isett & Brewster, then deemed by all parties to be more than sufficient for that purpose. Two contingencies which happened in the sequel, not then foreseen by Mr. Brewster, affecting the interests of his firm, will account for the subsequent difficulty. These were Isett & Brewster's defeat through the litigation with Holden, and the depreciation in value of the Holden pork—by the one, they were postponed to the satisfaction of Holden's claim for $17,000; and by the other, the surplus in their favor was annihilated, or reduced to a nominal amount. Mr. Brewster, who foresaw neither contingency, immediately and willingly seconded and approved Butler's plan, to the extent of himself becoming the instrument of carrying it out. It is true, that Butler and Brewster give contradictory

accounts of these interviews and transactions. But the letter of Butler, dated April 24, 1865, is decisive in Butler's favor. That letter admits of only one construction, or explanation; that is afforded by Butler. Brewster ignores it; yet does not deny that the letter was written and sent; nor is he explicit in denying knowledge and approval of it at the time. His testimony and answer on this point are altogether evasive and unsatisfactory. The existence of this letter, its communication to Finley, and Finley's approval of it, are not denied in the argument. On the contrary, these circumstances are expressly conceded. It is this letter, which, fortified by all the other proofs offered by the plaintiff, fixes absolutely and forever the rights of the parties to this dispute. If it be once admitted, it proves the trust in our favor; and disproves Isett & Brewster's right to a priority as completely as if the whole transaction had been witnessed by a formal written instrument of the same tenor with that letter. The letter becomes the memorial of their agreement with as much effect as if signed by the parties. Then with the rights of the parties so fixed and evidenced, is it likely that Mr. Finley, in the October following, should make the admission contended for? If he did make that admission, must he not have done so through some misapprehension? Is it not plain that the admission, however made or procured, was contrary to the fact? And can it be urged that a casual and mistaken admission, evidently contrary to admitted facts, shall be conclusive? Nothing can be plainer than that Finley, in July, 1865, considered the notes and mortgage as standing in Isett & Brewster's names for his benefit. See his letter of that date. [Pr. Rec. 62.] Butler tried to get Brewster to make the transfer, he having "told Finley that he had "better have the notes and mortgage in his own possession, and "that when I returned to Muscatine I would send them to him." [Ev. Butler, p. 55.] "On my return I asked Mr. Brewster to "give me the notes endorsed without recourse, that I might send "them with the mortgage to Mr. Finley." *Ibid.* Brewster's objection was merely to the form of the transfer, not denying the right of Finley to have the transfer made; much less setting up any claim for himself, or in opposition to that of Finley. Butler then devised a plan which should obviate Brewster's objection, and

yet secure Finley. It was to cancel the notes and mortgage, and give new notes and a new mortgage to his son for Finley's benefit. This Finley objected to. He says, "I would prefer to hold the "mortgage as given to I. & B. If necessary to change the mort- "gage, have it made to some other person for my benefit, or make "it in my name. I can see no reason why the notes and mort- "gage given to I. & B. cannot be transferred, and release them "from liability. I think it decidedly better to make no other "change from I. & B. than I have named." [Pr. Rec. 62.] This letter could not have been written if Mr. Finley had supposed, or known, that Isett & Brewster claimed the notes for themselves, and for that reason refused to transfer them. Mr. Finley continued to claim the securities in the same manner in the month of October, at the time the alleged admission is said to have been made. Higgins testifies that one reason why he declined to buy these securities of Brewster, in October, 1865, when Brewster offered to sell them, was that Brewster had no right to make such disposition of them, after having informed him in April previous, that his firm had received and then held them in trust; and another reason was that he knew that Finley claimed the mortgage, "and he did not want to buy a law suit with him." [Ev. Higgins, Pr. Rec. 140.]

Butler's account of what was said and done when Brewster first put forth this claim to Mr. Finley is, that Brewster did not assert a positive claim; but that he somewhat covertly claimed a priority; and that Finley did not in words assent to that claim. He said very little; he listened, but did not say much. [Ev. Butler, Pr. Rec. 55.] The explanation is easy. Mr. Finley found himself at a grievous disadvantage. Instead of a ready concurrence in his views on the part of Brewster and Butler as to the transfer of these securities, he found Brewster steadily denying his rights; making claims on his own behalf until then unheard of. With no title deeds in his hand, and Butler probably in some degree influenced by Brewster's artful suggestions of further assistance by way of money loans, (as to which more or less of intrigue had been going on between that season, as appears from Brewster's own disclosures,) giving way to him, and so far as acquiescence went, lending himself to Brewster's support. The

conversations appear to have been informal and hurried. Such as they were, Brewster finds in what thus occurred the first evidence in his favor. He calls it an admission, and presses the inference.

The only other word or act relied upon as evidence is in the letters which Mr. Finley wrote October 20, 24, and 27, and the admission therein contained, that Isett & Brewster had a priority. When we see how he was influenced to write these letters, and make that admission, (if it be one,) we can estimate the weight which is due to it.

Finley's letters of Oct. 20, and 27, [Pr. Rec. 80, 81,] show that Brewster's pretensions and representations made in Butler's presence as to the mortgage having been given in the first instance for Isett & Brewster's benefit, "and when their claim was satisfied, "the transfer to be made to me," (Finley) were different from his previous understanding of the matter. He adds: "This is the "way I understand the matter *now*." He had supposed himself entitled to the sole benefit of these securities. He had relied upon Butler's promises and representations, and upon Brewster's fidelity to his trust. He found himself without a particle of evidence to sustain his claim, and opposed by Brewster's assumptions, and Butler's apparent support of these assumptions. He was away from home. And when he returned the letter of April, 24, could not be found, it was supposed to be lost. Under these circumstances, he receives the statements of Butler and Brewster, and forbears to assert his own claim for the want of means to support it. To things not existing, and to those not existing the same rule applies. Finley could not help himself. In reply to the claims and proposals of Mr. Brewster, he says he cannot pay him his price for the transfer of the securities. And that is all the admission that he made. Again he says: "Your statement, in "letter of October 25, of the proposition *you made me at Butler's house* is correct. He does *not* admit that that proposition itself was correct. He only says: Your letter relates that conversation correctly. Whether what was advanced at that conversation was correct is *now* the question, and was *not* admitted by Mr. Finley. Instead of admitting it, he says, Butler had in *several* previous conversations assured him that he would give me (Finley) a mortgage on the property. He adds, "The proposition *you* now make for Mr.

"Butler is for me to pay you $6,000, and then you will transfer "to me the mortgage, and bank claim, (Holden securities); *this I* "*decline*. I prefer a *second* (misprinted *security*) mortgage to this "proposition." [Pr. Rec. 80, 81.] Letter to Brewster. It is surprising that Mr. Brewster should under the stress and pressure of his present position, should construe statements of this kind an *admission*.

We submit that such an admission (if admission it be) cannot change the fact, nor can it release the trust once shown to exist. Mr. Brewster, charged with the obligation of executing that trust, cannot escape from that obligation except by the performance of the duty it imposed. No admission of Mr. Finley can release him from his duty as trustee. It is for the Court to decide the *very fact* from the evidence. Finley's admission, in the fall of 1865, however solemn, formal, or deliberate it might be, cannot destroy the letter of April 24, 1865; nor Butler's testimony; nor Brewster's declarations in express terms that a trust existed; nor the testimony of Holden and Higgins; nor can it do away with the effect of that tremendous admission of Mr. Brewster, in June, 1865, that he would then, if asked how he held these securities, whether as owner, and on his own account, testify under oath as a witness in a court of justice; that Isett & Brewster were not the owners of those securities; that they did not receive them on their own account; but that on the contrary, they had received them on account of *another party*, for whose benefit *they held them in trust*. We cast this admission of Mr. Brewster into the scale against the alleged admission of the plaintiff. If it were alone, it would preponderate. It was solemn and express, made in view of the most awful sanctions, and cannot be explained away. But it does not stand by itself. It agrees with a body of evidence of the most conclusive character. We cannot doubt the decision of the Court upon this fact. And we humbly pray that the decree of the Court below may be reversed.

Respectfully submitted by

ARTHUR W. WINDETT,

March 10, 1869. *For Complainant in Error.*

Ira C Mills

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